B. Sivaramayya

Women's Rights of Inheritance.

ABSTRACT

This thesis examines the problems relating to equality of sexes under the Hindu and Muslim Laws of Inheritance and suggests proposals to achieve equal rights for women. The first part deals with the position of women under the Hindu law and studies the Mitakshara coparcenary in the contemporary context, women's rights under the Hindu Succession Act and the available mechanisms to defeat their rights. The elective share in New York and marital community in Quebec are examined as protective devices and their suitability in the Indian context is evaluated. The introduction of a compulsory portion to protect the rights of women is suggested.

The second part of the thesis deals with the women's rights of inheritance under the Hanafi and Shia laws in India. Reform of the Muslim law of inheritance and the mode of implementing it to give equal rights to women are considered.

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WOMEN'S RIGHTS OF INHERITANCE : A COMPARATIVE STUDY OF THE HINDU, MUSLIM, NEW YORK AND QUEBEC LAWS.

by

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Statement

This thesis examines the problem of equal rights of women under the Hindu and Muslim laws, and also studies the New York and Quebec laws with a view to suggesting measures for the protection of the rights of inheritance of women under the Hindu law. The comparative study undertaken here is the first of its kind. Therefore all the conclusions arrived at and suggestions made are original. The writer has benefited from the specialized works of others, especially on historical and sociological aspects and due acknowledgement has been made to these sources in the footnotes.

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difficulties of a non-Indian reader in understanding the subjects dealt with in the thesis. His constructive criticisms helped me to rewrite many portions and also to correct the faults in my style. I am extremely grateful to him.

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Abbreviations and Citations

In this study generally the forms of citation given in A UNIFORM SYSTEM OF CITATION published by the Harvard Law Review Association are adopted. However, in citing the Indian and Canadian materials the following abbreviations have been used.

A.I.R. All.	All India Reporter,	Allahabad.
A.I.R. A.P.	All India Reporter,	Andhra Pradesh.
A.I.R. Bom.	All India Reporter,	Bombay.
A.I.R. Cal.	All India Reporter,	Calcutta.
A.I.R. Ker.	All India Reporter,	Kerala.
A.I.R. M.P.	All India Reporter,	Madhya Pradesh.
A.I.R. Mad.	All India Reporter,	Madras.
A.I.R. Ori.	All India Reporter,	Orissa.
A.I.R. Pat.	All India Reporter,	Patna.
A.I.R. P.C.	All India Reporter,	Privy Council.
A.I.R. S.C.	All India Reporter,	Supreme Court.
All.	Indian Law Reports,	Allahabad.
B.L.R.	Bengal Law Reports.	
Bom.	Indian Law Reports,	Bombay.
Bom.L.R.	Bombay Law Reporter.	
B.R.	Banc du roi (or de la reine), Rapports Judiciaires.	

Cal.	Indian Law Reports, Calcutta.
C.C.	Civil Code (Quebec).
C.C.F.	French Civil Code.
C.S.	Cour Supérieure (Quebec).
Ex.C.R.	Exchequer Court Reports (Canada).
I.A.	Indian Appeals.
J.I.L.I.	Journal of the Indian Law Institute.
K.L.T.	Kerala Law Times.
Mad.	Indian Law Reports, Madras.
M.L.J.	Madras Law Journal.
M.I.A.	Moore's Indian Appeals.
R. du B.	Revue du Barreau.
R. de J.	Revue de jurisprudence.
S.C.J.	Supreme Court Journal.
S.C.R.	Supreme Court Reports (India).
W.R.	Sutherland's Weekly Reporter.

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PART 2 : MUSLIM LAW

GENERAL INTRODUCTION

The primary aim of this study is to investigate the position of women in the Hindu and Muslim laws of inheritance and to suggest the means of achieving equality between the sexes with respect to inheritance in India. In India the laws of inheritance are "personal laws" and consequently they are governed by the religion of the parties.[1] The Hindu and Muslim laws of inheritance govern approximately ninety-three per cent of the five hundred and thirty million people in India. Thus the importance of the study can hardly be exaggerated.

The status of women is increasingly being seen as a matter of great importance. On November 7th, 1967, a resolution of the United Nations General Assembly stated that full development of nations, the world's general welfare and the cause of peace require full equality of both sexes everywhere.[2] The resolution in particular called upon all nations to take "all appropriate measures" to abolish any law or custom that discriminates against women.

The Preamble to the Constitution of India affirms the objective of achieving social and economic justice for the people.

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1. If the parties are married under the provisions of the Special Marriage Act, 1954, succession to their properties and of their issues is governed by the Indian Succession Act, 1925, and not by the personal laws.

2. UNGA, Res. 2263 (XXII), 1597th Plen. Mtg., 22nd Session.

Article fourteen of the Constitution declares the Fundamental Right of people to equality before the law and equal protection of the laws.[3] Although the interpretation of the article has been befogged by the doctrine of reasonable classification, there can be little doubt that the laws of inheritance which discriminate on the ground of sex are opposed to the spirit of the Constitution.

Plucknett says: "The law of succession is an attempt to express the family in terms of property."[4] Under the Hindu law, the family usually means a joint family, with its special incidents. As observed by Mayne:[5]

> The student who wishes to understand the Hindu system of property must begin by freeing his mind from all previous notions drawn from English law. They would not only be useless, but misleading. In England ownership, as a rule, is single independent, and unrestricted. . . . In India, on the contrary, joint ownership is the rule, and will be presumed to exist in each individual case until the contrary is proved. . . . Individual property is the rule in the West; corporate property is the rule in the East.

The complexity is compounded because Muslim law is considered to be a "revealed" law. The Hindu law too was regarded as a sacred law till the recent enactments in 1955 and 1956 which introduced radical

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3. THE CONSTITUTION OF INDIA, art. 14.

4. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 673 (4th ed. 1948).

5. MAYNE, HINDU LAW AND USAGE 305 (9th Trotter ed. 1922).

changes. But the Hindu Succession Act, 1956, is a compromise between the progressive and the conservative sections of Hindu society and, therefore, leaves much to be desired.

An inarticulate major premise of this study needs to be emphasized: In India, law has a difficult role to play. In the West, generally speaking, law follows the public opinion. In India, on the other hand, law should mould public opinion, remove traditional attitudes and foster new values.[6] As stated by Stone:

> Those elected to govern such a country could scarcely be expected to wait on the pressure of demands from these hundreds of millions, most of whom are still, in any case, illiterate and innocent of civic consciousness to guide their policies. . . . Even down to the level of attention to the stagnant puddle in a village lane, the Indian picture remains fifteen years after independence, one of legislative striving to stimulate and even create a structure of de facto human demands.

One special problem in India will be to provide protection against disinheritance by will or testament, since there are weighty reasons which make it necessary to safeguard against the possibility of disinheriting female heirs. First, there is the traditional attitude that a son delivers the parents from the hell "Put" and that he continues the lineage. Second, the opportunities for women to

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6. Stone, The Golden Age of Pound, 4 SYDNEY L. REV. 1, 22 (1962-64).

engage in careers are limited in India, especially in the light of the prevalent unemployment even among men. Third, the economic role of women is restricted because of their responsibilities as mothers and housewives. Fourth, there are no tangible social security measures to protect the aged and infirm.

The details of Hindu and Muslim laws are complicated and therefore a background of these laws and their contemporary context is to be noticed. The study is divided into two major sections one dealing with the Hindu law and the other with Muslim law. While examining the Hindu law the experience of New York and Quebec are considered. In the following pages we have given a general background of the Hindu law and summarized the various aspects dealt with by the thesis.

A. HINDU LAW

1. Background

The first part of the study deals with women's rights of inheritance under the Hindu Succession Act. But in order to have a proper appreciation of its provisions, the background of the law before the Act must be noted. The laws of Shastras imposed many disabilities on women. Manu enunciated the perpetual tutelage of

women in the following terms:[7]

> "Her father protects (her) in childhood, her husband protects (her) in youth, and her sons protect (her) in old age; a woman is never fit for independence."

The incapacity of women to inherit under Hindu law is attributed to the statement of Baudhayana which says:[8] "Women are devoid of the senses and incompetent to inherit." In spite of this general disability to inherit specified female heirs were given the right to inherit by virtue of special texts. In the Bengal school of Hindu law, and in the Benaras and Mithila sub-schools of Mitakshara law[9] only five female relations could succeed as heirs to males. They were: (1) widow, (2) daughter, (3) mother, (4) father's mother, and (5) father's father's mother. To this list, by virtue of the Hindu Inheritance (Amendment) Act, 1929, three more female heirs were added, viz., son's daughter, daughter's daughter

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7. THE LAWS OF MANU, ch. IX, v. 3, 328 (Buhler translation, 1964 reprint).

8. Lulloobhoy v. Cassibai, 7 I.A. 212, 231. (1880).

9. The two main schools of Hindu law are: (1) the Bengal (Dayabhaga) school and (2) the Mitakshara school which is followed in other parts of India. Mitakshara school is divided into four sub-schools namely, Mithila, Benares, Bombay and Madras. These sub-schools are no longer material after the passing of the Hindu Succession Act, 1956. But one important feature of the distinction between the two schools still persists. Under the Bengal school the father is regarded as the absolute owner of properties. In Mitakshara law, the sons have a right by birth in the joint or ancestral properties in the hands of the father as distinct from the separate or self-acquired properties.

and sister.[10] The Madras school recognized a larger number of female heirs (including those enumerated above) and the Bombay school a still larger number as possessing capacity to inherit. Even in these cases, the rights of female heirs were less than male heirs, for whenever a female heir succeeded as heir to a male she took a limited estate (in the nature of a life estate) known as a Hindu woman's estate.

The problems of succession cannot be understood without reference to the law of joint family. Under the Mitakshara law, the law of succession is intimately connected with the special incidents of the coparcenary properties. In coparcenary properties a son, son's son and a son's son's son acquire a right by birth. Thus only males can be coparceners. An important category of coparcenary or joint family properties is property obtained from a father, a paternal grandfather and a paternal great-grandfather.

The salient feature of a Mitakshara coparcenary is the existence of community of interest, unity of possession and the right of survivorship among the coparceners. So long as the family is undivided, no individual coparcener can predicate of the joint family property that he is entitled to a specific share. His share is liable to increase by deaths and decrease by births. The shares are

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10. The Hindu Inheritance (Amendment) Act, 1929.

ascertained only by a partition. The properties are managed by the Karta (manager) who is usually the eldest among the coparceners. The manager of a joint family under the Hindu law has considerable powers. He may spend more on one branch than on the other and his discretion cannot be questioned. But his power of alienation is restricted. He can alienate the joint family properties only in cases of "legal necessity" or for the "benefit of the estate".

Prior to 1937 joint family properties devolved on the male coparceners according to the principle of survivorship. For example, under the Mitakshara law if two brothers A and B were living jointly and A died leaving no issue but only a widow, his undivided interest devolved on B by the principle of survivorship to the exclusion of the widow. The female heirs were entitled to inherit only in the absence of a son, or son's son, or son's son's son, whether natural or adopted. Adoption of a son was and is a common practice among the Hindus because of the notion that a son is necessary for the spiritual benefit of the ancestors.

The Hindu Women's Rights to Property Act, 1937 made a number of changes in the laws of inheritance; most notably, the principle of survivorship in the Mitakshara law was modified for the benefit of the

widow, although, again, in all cases covered by the Act, she had only a limited estate and not an absolute estate. The Hindu Succession Act, 1956, which will be the starting point of the present study introduced revolutionary changes. The limited estate of women was abolished. The mother, widow and daughters of the deceased are made primary heirs along with the sons.

The Hindu Succession Act expressly or impliedly recognises three important kinds of devolution: first, the devolution of an interest in joint family properties under Mitakshara law which is governed by section 6; second, devolution of properties governed by the matriarchal laws which has been dealt with in section 7; and third, the general rules of succession governing the remaining cases (specially the separate properties under the Mitakshara law and properties governed by Dayabhaga law) in section 8. The present study excludes the consideration of the second category of devolution, as matriarchal societies are ex hypothesi not based on the notion of inferiority of the female sex. However, it should be added that the problems relating to disinheritance which may arise in the third category of cases can well arise even in the second category and the same considerations and policies applicable.to the general rules under section 8 are applicable mutatis mutandis.

2. Basic Problems under the Hindu Succession Act

The problem relating to the disinheritance of female heirs arises because when the legislature gave rights of inheritance to female heirs under the Hindu Succession Act, it gave equally unrestrained power of testation to a deceased to disinherit them. But there is an even more acute problem regarding equal rights of inheritance as between male and female heirs of the same degree. The Mitakshara joint family system which governs the vast majority of Hindus is retained in principle. The Committee appointed by the Government to suggest reforms in the Hindu law recommended its abolition.[11] Dr. Kane, the renowned author of the History of Dharmasastra, expressed his agreement with the recommendation.[12] The major characteristic of the Mitakshara coparcenary is the existence of the right by birth under which a son is entitled to an equal share with the father in ancestral properties.[13] One result of the retention of the Mitakshara system is the great disparity in the shares of the male and female heirs of the same degree, or rather between the sons and daughters in the coparcenary properties. For

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11. THE REPORT OF THE HINDU LAW COMMITTEE 13 (1955, reprint) (hereinafter cited as the Rau Committee).

12. 3 KANE, HISTORY OF DHARMASASTRA 823 (1946).

13. See p.1 infra.

instance, let us assume that a deceased died as an undivided member of the joint family leaving two sons and a daughter as heirs. According to section 6 of the Hindu Succession Act only the father's one-third interest in the joint family property will be divided under the Act. The result is that the daughter's right in the property will be one-ninth and the sons will have four-ninths of the property each.

It may be argued that the vice does not pertain to the law of succession but to the right by birth. This casuistry cannot obscure the fact that the right by birth is at the root of inequality in the successional portions and that the disparity turns solely on the ground of the sex of the child. It is equally important to notice that there is no impediment to a person converting his self-acquired property into joint family property. No formality is required except that the intention to do so must be clearly established or expressed. Thus under the Mitakshara law property governed by the rule of equal division irrespective of the sex under section 8 can be made to be governed by the rule of unequal division under section 6.

But it would be rash to conclude that the legislature acted whimsically in retaining the Mitakshara coparcenary system. Although

the view was expressed during the debates in the Parliament that the Mitakshara coparcenary was a "tottering" structure on account of the "shattering blows" delivered to it by the enactments from time to time, and no useful purpose would be served by it, the opponents argued that "though battered and bruised" the institution did and could play a useful role, that there is mutual help among the members of a joint family and under it disabled members are protected.

The legislature arrived at a compromise by retaining the right by birth of the coparceners (only males can be coparceners) and making the interest of the deceased alone devolve under the provisions of the Act. The legislature did not think in terms of alternative solutions and none was suggested. The situation demanded a break from the past more than a search for, and adoption of, more meaningful solutions. The present study in part aims at examining this hitherto unexplored area, to arrive at an alternative which can be regarded as a functional substitute to the joint family in its existing form and which at the same time does not base itself on the norm of discrimination.

B. THE WESTERN EXPERIENCE

The experience of the West, more specifically that of New

York and Quebec were studied with a view to suggesting modifications in Hindu law with reference to the women's rights of inheritance. At the outset the question arises: In what way is the experience of the West material and useful ?

The impact of Westernization on India may be roughly said to have commenced from the middle of the nineteenth century when the administration of the East India Company gave way to the Imperial Administration. There was a steady stream of Westernization of the laws in all fields excepting family law. Though the British Administration adopted an attitude of non-interference in the personal laws of the Hindus and the Muslims, the process of interaction with the Western culture and ideas, which were individualistic in character, nevertheless left their mark. These Occidental influences weakened the traditional controls of the family to a large extent. Notably, the Caste Removal of Disabilities Act, 1850 deprived the caste and family groups of their power to impose effective sanctions by means of forfeiture of property rights on erring members. The Hindu Gains of Learning Act, 1930 passed at the initiative of the Hindu members themselves, indicates the emergence of the preference for the individualistic concepts of property to that of corporate character of family property. The trend continues unabated because of factors like

industrialization which makes it necessary for the members in the family group to leave the family in order to earn a livelihood, the conditions of urban dwelling and the ceilings on land holdings. Therefore, the institutions of the family are subjected to the impact of social conditions as in the West, though varying in their extent and results.

Generally speaking the common law systems were concerned with the protection of the widow only. Dower and the elective share of the widow in many jurisdictions in the United States exemplify this trend. However, one notices a growing awareness in the common law jurisdictions that the obligation of the deceased extends to other members as well and the Family Provision statutes seek to fill this gap. In this context it should also be borne in mind that in the Western world the need to protect the inheritance rights of children is not keenly felt unless they are disabled or infants. This is because of such factors as the existence of adequate opportunities for employment, well-organized voluntary bodies to help needy people and the social-security measures. Nonetheless, in the civil law systems protection to the children is accomplished by means of legitime or compulsory portions and in case of the widow by means of legitime or marital community.

To illustrate the available legislative techniques for protecting rights of inheritance of female heirs, this study foccuses attention on the legal systems of New York and Quebec. New York is a state governed by the common law and its legislations are introduced after a careful consideration and are subjected to constant revisions. In the Province of Quebec, the civil law prevails with the significant difference that the freedom of testation is a cardinal principle of its Code. In other words, the community of property exists to protect the rights of the widow but no protection is given to the successional portions of children as in other civilian systems. The New York law will be particularly instructive in pointing out the devices that may be resorted to defeat the protection given by the statutue in a common law system like India.

The present study considers the feasibility of these techniques in India. One aspect common to these techniques (barring the Family Provision Acts) is that they rely on a legislative determination which is of a fixed character; that is to say, they are not dependent on a flexible determination by courts of the protection which is to be afforded. A priori it is assumed here that a legislative determination is more suited to India for the protection of the members of the family as it avoids the costly and time consuming judicial determination. It is to be noted that under the existing

provisions of Hindu law, the provisions relating to maintenance under the Hindu Adoptions and Maintenance Act effectively serve the function of a Family Provision Act.[14] Some support for this view can even be drawn from the following statement of Laufer, a perspicacious advocate of flexible restraints on testamentary freedom.[15] He says:

> The maintenance principle is essentially modern in contrast to the system of legitim or forced share. The latter is based on the ancient notion that the decedent's estate is the product of a joint family effort and hence family property which is equally distributable among those who contributed to its production. This notion is no longer relevant to our present urbanized and industrial society.

In India the social conditions are far from those mentioned above. The problem lies in the opposite direction - to find an alternative to the joint family system of the Mitakshara law which at the same time does not kill the joint family effort for common prosperity.

C. MUSLIM LAW

The second part of the study deals with women's rights of

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14. The Hindu Adoptions and Maintenance Act, 1956, sec. 22 (2). It says: "Where a dependent has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependent shall be entitled, subject to the provisions of this Act, to maintenance from those who take the estate."

15. Laufer, Flexible Restraints on Testamentary Freedom — A Report on Decedents' Family Maintenance Legislation 69 HAR.L.REV. 277, 313 (1955).

inheritance under the Muslim law. Muslim law, in its attitude to women's rights of inheritance reveals redeeming as well as regressive features. On the positive side, it significantly checks the problem of disinheritance because it permits the deceased to bequeath only one-third of his estate. The manifest problem is the concept of inequality inherent in the law of succession whereby a female heir will take only one-half of what a male heir of the same degree would take. But by far the most intractable problem arises because of the static concept of laws, that is, the view that they are revealed and, therefore, immutable. The above factors necessitate a separate consideration of these laws.

It would appear that certain incongruities and fallacies lie behind the static concept of laws now pervading the minds of Muslims in India. That adherence to the Quranic law of inheritance is a necessary tenet of Islam is belied historically and sociologically. First, it negates to a regrettable degree the important role of the Prophet as a reformer of the Arab society. If there is one aspect that is most conspicuous in the life of the Prophet, it is the transformation and reform that were brought about by him in Arabia. Secondly, it may be said that if the adherence to the Quranic law of inheritance is a sine qua non of Islam then, the Muslims in

Indonesia, Turkey and in many regions of Africa cease to be Muslims. But none can deny their true and honest adherence to Islam. Even in India before the passing of the Shariat Act, 1937 the Muslims of the Punjab, Malabar and many sects in Bombay were governed by the customary laws and not by the Sharia. Pakistan which shared common legal history and institutions with India until 1947, introduced important changes in the Muslim law of inheritance in 1961. In view of their importance a considerable part of this study is devoted to these fundamental aspects.

CHAPTER ONE

MITAKSHARA JOINT FAMILY AND ITS CONTEMPORARY CONTEXT

A. INTRODUCTION

The vast majority of Hindus in India are governed by the Mitakshara law and the special features of its joint family. The most salient feature of the Mitakshara joint family is the existence of a right by birth in favour of a son, a son's son and a son's son's son in the ancestral or coparcenary properties. Coparcenary properties are, in the language of Hindu lawyers, unobstructed heritage (apratibandhadaya) because the existence of a father, grandfather and great grandfather is no impediment to his (son, son's son and son's son's son) acquiring an interest in the properties and which he is entitled to enforce by means of partition. The important categories of properties which fall within the definition of ancestral properties (often referred to as joint family properties) are: (1) property inherited by a male Hindu from his father, father's father and father's father's father, (2) accumulation of income from joint family properties and (3) properties thrown in the common stock.[1] The self-acquired property of a person devolving on his sons on intestacy becomes ancestral property in their hands. If on the other hand the

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1. See pp. 82-83 infra.

of the Schedule are made simultaneous heirs in respect of the undivided interest of the father. The share of the father is ascertained by assuming that a notional partition had taken place immediately before his death.[5]

The retention of right by birth is the primary cause of inequality in the shares given to female heirs like a daughter and wife vis-a-vis a son under the Hindu Succession Act. To take a simple illustration, a male Hindu dies leaving a son and a daughter as heirs. In the ancestral properties the son is entitled to a share equal to that of the father. Under the Act, only the father's interest, that is, half share in the properties, will devolve equally on the son and the daughter. The result is that the daughter gets a one-fourth share and the son gets three-fourths, one-half by virtue of the right by birth and one-fourth by succession under the Act.

This, as is widely acknowledged, is a compromise between the traditional and progressive views that prevailed in the Hindu community. The proponents of the former view wanted no inroad to be made in the Mitakshara coparcenary concept and desired the Act to leave untouched the law relating to the devolution of coparcenary properties. In other words, the Bill should be made applicable only to the self-acquired or separate properties of persons governed by the Mitakshara law. The Progressives argued, (correctly, in the

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5. The Hindu Succession Act, 1956, sec. 6, Explanation 1.

writer's view) that if the Bill is not made applicable to the coparcenary properties, the disabilities of daughters to inherit are hardly touched as the vast majority of Hindus are governed by the Mitakshara law. Views were expressed which not only preferred the conversion of the Mitakshara coparcenary into the Dayabhaga coparcenary, but also that there should be complete equality in matters of inheritance and succession.

The compromise solution, as it finds expression in section 6 of the Hindu Succession Act, 1956, implicitly assumes that the institution of Mitakshara coparcenary should be preserved; that its retention is socially beneficial and legally preferable to the alternative proposed by the Rau Committee, namely, the conversion of the Mitakshara coparcenary into the Dayabhaga coparcenary. This assumption has far-reaching implications when considering equal rights of succession of women. In contrast, the Act provides for equal rights to female heirs in all respects under the Dayabhaga law and the matriarchal Marumakkattayam law. Therefore, if the conversion of the Mitakshara coparcenary into the Dayabhaga coparcenary had been accepted in principle, then the existing discrimination against female heirs, especially daughters, would largely disappear. It is now proposed to show that the basic features of the Mitakshara coparcenary have been eroded by judicial decision, legislation and altered conditions in society; and that as an institution it is obsolete and out of tune with

the contemporary conditions. Secondly, to the extent that there are beneficial features, they can be achieved by using the Dayabhaga coparcenary. Thirdly, historically, the adherence to the Mitakshara coparcenary is not justified; family institutions were never static in the Hindu society and were subjected to changes at different periods.

B. DEVELOPMENT OF THE CONCEPT OF JOINT FAMILY UNDER MITAKSHARA LAW

To take the last point first, originally the Hindu family was patriarchal in its character. Of the position of Grihapati or the master of household in the Vedic times (4000-1000 B.C.), Sarvadhikari[6] says:

> He was the patriarch of the family, and his authority was absolute. . . . He exercised supreme authority over the person and the property of all who were immediately under his control.

During the Smruthi period (200 B.C. - 200 A.D.) the position does not appear to be different. Manu states:[7] "A wife, a son, and a slave, these three are declared to have no property; the wealth which they earn is (acquired) for him to whom they belong."

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6. SARVADHIKARI, THE PRINCIPLES OF THE HINDU LAW OF INHERITANCE 167-68 (2d ed. J.P. Sarvadhikari 1922).

7. LAWS OF MANU, Ch. VIII, v. 416, 326, (Buhler translation, 1964 reprint).

But gradually the rights of sons in the property of the father were recognized. For example in the Dharmasutra of Gautama (600 - 400 B.C.) we find it mentioned that the sons could enforce partition against the wishes of the father. This would appear to be legal though opposed to good morals.[8] It may be mentioned that Muttusami Aiyar, J., in Ponnappa Pillai v. Pappuvayyangar[9] points out that the Hindu and Roman laws not only shared the patriarchal principle but also the concept of inchoate ownership of the sons or family heirs even in the lifetime of the father. But unlike in Rome, the eminent judge says, the concept of inchoate ownership in India led to a different notion that family is a corporate body and that landed property is a fund necessary for its subsistence and no father is competent to alienate it.

Mitakshara lays down the first result of the inchoate ownership, that is the restriction on the power of alienation of the father in the following words:[10]

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8. JOLLY, OUTLINES OF AN HISTORY OF THE HINDU LAW OF PARTITION, INHERITANCE AND ADOPTION 99 (1885). The development of the rights of sons under the Hindu law was traced in the above work. Also, see SEN-GUPTA, EVOLUTION OF ANCIENT INDIAN LAW 212-13 (1953).

9. 4 Mad. 1, 32 (1881). He refers to the statement of Justinian that sui heredes are called so because they were family heirs and even in the lifetime of their father owners of inheritance in a certain degree.

10. THE MITACSHARA, VYAVAHARA ADHYAY, Pt. II, ch. I, sec. I, v. 27, 254-55 (ed. Tarkalankar 1870), (Translation by MacNaghten and Colebrook) (hereinafter cited as MITAKSHARA).

> Therefore, it is a settled point, that property in the paternal or ancestral estate is by birth, (although) the father have independent power in the disposal of effects other than immovables, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth: but he is subject to the control of his sons and the rest, in regard to the immovable estate, whether by himself or inherited from his father or other predecessor. . ..

Pausing here for a moment, it may be pointed out that there were other texts in Mitakshara[11] which laid down father's absolute right of disposition over his self-acquired property. The Judicial Committee of the Privy Council after considering these conflicting texts and decisions based on them, held in Balwant Singh v. Rani Kishori[12] that a father can exercise full power of disposition at his own discretion over immovables which he himself acquired.

Along with this change from the patriarchal concept of property to the joint family concept, there was a gradual development in the law relating to the son's right to demand partition. When the patriarchal concept of property prevailed, it is obvious that the son could not ask for partition. In Manu we find it stated that the property was divisible only on the death of the father.[13] According to the gloss of Kulluka, property could also be partitioned during the

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11. MITAKSHARA, supra, Pt. II, ch. I, sec. V, vs. 9 & 10, 280-81; and Pt. II, Ch. I, sec. I, v. 21, 252.

12. 25 I.A. 54 (1897).

13. LAWS OF MANU, supra note 7, at ch. IX, v. 104, 345.

lifetime of the father with his consent.[14]

The next stage in the development of the son's right to obtain partition was that he could exercise the right even without the wish of the father, if the father was old, disturbed in intellect, or diseased.[15] With the recognition of the equal ownership of the father and the son in the joint family property, the son's right to demand partition was also recognized. However, for our purposes, the theoretical basis on which such a right of the son was recognized is noteworthy: that it increases spiritual benefit. Manu says: "Either let them live together, or if they desire separately to perform religious rites, let them live apart; since religious duties are multiplied in separate houses, their separation is legal." To this Kulluka's gloss adds "even laudable".[16]

The verse cited above emphasizes the importance of spiritual considerations in the moulding of the property-concepts in Hindu law. It can be argued, as some writers did, that spiritual reasons are only a cloak to justify the de facto property notions. Even then, the power of an argument deriving its support on spiritual considerations cannot be underestimated.

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14. Ibid.

15. INSTITUTES OF HINDU LAW, ch. IX, v. 3, 197 (Jones transl. 1797). See also MAYNE, A TREATISE ON HINDU LAW AND USAGE 324 (9th ed. Trotter 1922).

16. Ibid.

C. THE PRESUMPTION THAT A HINDU FAMILY IS JOINT

For our purposes the dominant notions relating to joint family in the Anglo-Hindu law are important. The first is the presumption that a Hindu family is joint. On this aspect the courts in India are guided by the statement of the Privy Council in Neelkisto Deb Burmono v. Beerchunder Thakoor[17]:

> The normal state of every Hindoo family is joint. Presumably every such family is joint in food, worship, and estate.
>
> In the absence of proof of division, such is the legal presumption; but the members of the family may sever in all or any of these things.

1. Sociological Validity

For a period of over eight decades, the courts have followed presumption laid down in the above case. The contemporary sociologists expressed their disagreement with the above legal statement as being at variance with the social facts in India, or at any rate, expressed their misgivings. It is submitted that the socilogists are right in their conclusions.

Appropos of this, Professor Kapadia's study says:[18] "In rurual community, the proportion of joint families is almost the same

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17. 12 M.I.A. 523, 540 (1869). See p. 12 infra.

18. Kapadia, Rural Family Patterns : A Study in Urban Rural Relations 5 SOCIOLOGICAL BULLETIN, 111, 113 (1956).

as that of nuclear families."[19] His study indicates that while among the higher castes we find 0.6 nuclear family, per every joint family, among the lower castes for every joint family there are 1.2 nuclear families. As the study was conducted before the full impact of the land legislations, it is quite conceivable that the proportion of nuclear families may now be higher in rural areas. Under the land ceilings legislations in the various states, ceilings were imposed on the agricultural land that can be owned by families. To mitigate the effects of these legislations, partitions were affected on a large scale. Professor Karve, a well-known sociologist, says :[20]

> However, recent surveys carried out by the Deccan College, Poona, have shown that over large areas the predominant pattern of family (up to 70 per cent) is the nuclear family. The incidence of nuclear families is larger in urban areas, while joint families are more numerous but still in a minority in the rural areas.

She states that conjugal or nuclear family is becoming the normal pattern even though the sentiments and moral values cultivated in joint family continue to play a role in the family of Hindus. Significantly she adds: "But there is no doubt that even in rural areas the joint family as depicted in Indian scriptures and law books is disappearing."[21]

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19. By definition a nuclear family group consists of a husband, wife and their children. A Hindu joint family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters.

20. Karve, The Family in India, in CONTEMPORARY INDIA 46, 56 (Varma ed. 1964).

21. Ibid.

It may then be asked, if the presumption relating to joint family now prevailing in law is not justifiable in fact, how could it continue so long and even be incorporated into the Hindu Succession Act of 1956 ? To this Professor Kapadia's study provides some clues. The joint family was a normal feature among the higher castes who owned land and who were engaged in business. Even in cases where members of lower castes gained social status by reason of their wealth, they readily adopted the patterns of behaviour of the higher castes --- a process which is referred to by the sociologists as "sanskritization". As the elite in the society like the lawyers, legislators, and judges came from the higher castes or the sanskritized lower castes, the institutions of these groups were mistakenly regarded as representative of the general mass of people.

Bhattacharya says that large joint families comprising of several branches and consisting of cousins removed by four degrees are of modern origin.[22] In his view large joint families came into vogue during the Moghul rule when there was a general insecurity of life and property; that during the unsettled political conditions in this period the instinct of self-preservation led people having common bonds of kinship to come together. He also points out that owing to the cumbrous nature of partition of zamindari properties and the difficulties

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22. BHATTACHARYA, THE LAW RELATING TO THE JOINT HINDU FAMILY 176 (1885).

involved in it, the coparceners preferred to continue joint. Now zamindaries no longer exist, as they have been abolished in every state, and security to life and liberty are firmly established. Therefore, even apart from the altered social conditions, the former motivations which induced people to live in large joint families would seem to be no longer present.

2. Jointness in Food, Worship and Estate

Even in cases where a joint family continues it is doubtful whether the elements mentioned by the Privy Council are found. The Privy Council's classic statement noted earlier points out that a Hindu family is joint in food, worship and estate. In this context a relevant question is: What is the relative weight of these elements in a joint family ? To what extent are these factors significant in India today ? At least a century separates the present time and the time when the presumptions pertaining to the jointness of a Hindu family have been judicially enunciated.

Taking the element of joint worship first, one notices a general obsolescence of this test. When the ancient commentators approved partition as an act that multiplies spiritual benefit they had in mind the performance of shradhs and the five great sacrifices enjoined by Manu. However, the connotation of the word "worship" changed in course of time to the worship of permanent household

idols.[23] Generally speaking, the element of worship lost its significance in all but a microscopic minority of families. Even with reference to such families, in view of the overall secularization of law brought about by the recent legislations in Hindu law, it is submitted, that this element should not be given any weight. In the case of numerically large number of lower castes, the element of joint worship as an indicia of jointness of the family, was never of any consequence and was even unknown. The term "Hindu" for purposes of law includes persons who profess Buddhism, Jainism and Sikhism. These religions do not adhere to the Hindu beliefs relating to worship.

This leaves the other two elements, namely, food and estate as indices of joint family. The general criticism levelled by sociologists against lawyers and on their test of joint family is that they over-emphasize the fact of joint holding of estate to an extent not warranted by social facts. They in particular point out that a joint family may not have any property at all and that in considerable number of cases there is nothing to share except debts. Though the sociologists may not be in agreement as to what should be the test of jointness, still their criticism against the prevailing legal test as being totally out of tune with social realities is well-founded.

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23. Id. at 190.

Indeed, social factors like migration of junior members to urban centres for employment, and serious housing shortgages in rural and urban centres show that the former tendency of members of a family consisting of three or more generations to live in the same household is seriously on the decline.[24] Ross says:

> Economic factors have probably been the main determinant of the increasing number of family separations, for the inability of the land to support the growing population has forced many sons to leave home to seek their livelihood in the growing cities.

The observations of the National Sample Survey on the households and their sizes are instructive.[25] For the purposes of the survey a household is defined as "a group of persons usually living together and taking their principal meals from a common kitchen."[26] The Survey says:[27]

> In the rural area a little more than 68 per cent of the households did not possess more than two rooms, and in the urban area this percentage was a little more than 69. Households possessing from three to six rooms accounted for 29 per cent in the rural sector and about 27 per cent in the urban sector where the majority of the households 58.45 per cent in the rural area and 51.51 per cent in the urban area had three to six members. Among the six Population Zones it was observed that in the three rural zones, namely, South . . . , West . . . , and Central India . . . , the percentage of households possessing one room was higher than in the other

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24. ROSS, THE HINDU FAMILY IN ITS URBAN SETTING 41 (1961). Even if they are living separately the property continues to be joint.

25. The National Sample Survey, Eleventh Round, August 1956 -- January 1957, No. 51 (Cabinet Secretariat : Government of India) (hereinafter cited as Survey).

26. Id. at 4.

27. Id. at 6.

> three zones, namely, North . . . , East . . . , and North-West India. . . . In the first three zones this percentage was of the order of 42, and in the other three zones it varied from 25 to 34. The crowding in one room accommodation in big cities like Calcutta, Bombay, Delhi and Madras was still worse than in either small or big towns. In these cosmopolitan cities about 65 per cent of the households lived in one room whereas about 36 to 38 per cent of the households in small and big towns possessed the same type of accommodation.

Besides economic factors, the other contributory causes that lead to the disintegration of large joint families are: (1) Heavy expenses of weddings and religious ceremonies in a joint family;[28] (2) Urbanization;[29] (3) The increase in the higher education among women,[30] and (4) "Personality clashes" in a joint family.[31]

Thus, it is clear that to say a family is joint on the basis of common holding of property, although there is no common mess, involves considerable incongruity and even contradiction in terminology. The legal concept of jointness hinges wholly on the joint holding of property or rather the absence of a unilateral declaration of an intention to separate. The Privy Council in Suraj Narain v. Iqbal Narain[32] observed: "A separation in mess and worship may be due to

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28. ROSS, supra note 24, at 25.

29. Id. at 26.

30. Id. at 25.

31. Id. at 16.

32. 35 All. 80, 88 (1912) (P.C.).

various causes, and yet the family may continue joint in estate."

Again, in Amritrao v. Mukundrao,[33] they stated:

> [I]t is well established that the unequivocal and unmistakable manifestation by a member of a joint Hindu family by his words or conduct of a fixed or determined intention to become separate is sufficient to effect the separation of his title and severance of his interest, although division of possession, or partition by metes and bounds, does not take place, or though there be no separation in food and dwelling.

Therefore, when people argue for the retention of the Mitakshara coparcenary, they are in effect emphasizing only one aspect, that is, holding of the property. In other words, the sentiment in favour of joint family under the Mitakshara law is only a sentiment in favour of the retention of the Mitakshara coparcenary, which is a creature of law. It is now proposed to show that (1) judicial and legislative changes have made great inroads in the original concepts of the Mitakshara coparcenary property to meet the needs of altered social conditions, and in this process the essential features of the coparcenary property were swept away, and (2) but for these changes which buttressed the tendency to retain the joint holding of the property, the coparcenary would have become obsolete. As pointed out by Professor Kapadia, judiciary and legislation have created a favourable climate to perpetuate it in form even when they have annihilated it in spirit.[34]

D. INCIDENTS OF THE MITAKSHARA COPARCENARY AND THEIR PRESENT VALIDITY

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33. A.I.R. 1919 P.C. 91, 92.

34. Kapadia, Changing Patterns of Hindu Marriage and Family, 4 SOCIOLOGICAL BULLETIN 190-91 (1955).

1. General

Unlike the Dayabhaga coparcenary where the coparceners hold the property as tenants in common, in the Mitakshara coparcenary the property is held by the coparceners as joint tenants. The classic formulation of the nature of holding of joint family property in the Mitakshara law is to be found in the statement of the Privy Council in Katama Natchiar v. The Rajah of Shivagunga.[35] Referring to the Mitakshara law[36] it was observed:

> According to the principles of Hindoo law, there is coparceneryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession.

Elucidating the nature of the interest of an undivided coparcener, in Appovier v. Rama Subba Aiyan[37] they observed:[38]

> According to the true notion of an undivided family in Hindoo law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share.

These basic features of the Mitakshara coparcenary, namely, community of interest, unity of possession and right of survivorship were considerably eroded by judicial decision and legislative enactments.

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35. 9 M.I.A. 543 (1863).

36. Id. at 615.

37. 11 M.I.A. 75 (1866).

38. Id. at 89.

Two types of influences underline these changes. First, under the impact of the doctrines of English law, the courts thought it necessary to give protection to a purchaser of the undivided interest of the coparcener and to a creditor who advanced monies to a coparcener. The second was to accommodate the individualistic notions of the property by recognizing the right of a member of the joint family to his self-acquisitions; and by the recognition of the principle that separate and self-acquired properties of a coparcener will devolve under separate rules of succession which provided for the greater recognition of the rights of the members within the conjugal family circle than under the rule of survivorship. In the words of Vishwanatha Sastri J., in Peramanayakam v. Sivaraman[39]:

> The joint family system has however been invaded and rudely shaken by doctrines inspired by English legal conceptions and the demands of a progressive society. The Courts too have lent a helping hand to influences that have undermined the integrity of the joint family. The law relating to self-acquisitions as developed by Courts has responded to the desire of the members of the family to secure their own economic freedom and betterment by individual effort and exertion.

2. Recognition of Right of Alienation of A Coparcener of His Undivided Interest

Strictly speaking, the community of interest and unity of possession in the Mitakshara coparcenary should negative the right of voluntary alienation of a coparcener or an involuntary alienation

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39. A.I.R. 1952 Mad. 419, 439 (F.B.).

affected through the process of the court. In the Provinces of Madras, Bombay and the Central Provinces, the courts influenced by the notions of English jurisprudence, and especially by the equitable doctrines, recognized the right of an undivided coparcener to alienate his interest in the coparcenary properties. The evolution of this right was entirely due to the solicitude of the early English judges like Colebrook, Ellis and Strange who administered the Hindu law.[40] Bhattacharya attributed the development of this right to the fact that Colebrook and Strange first studied the Dayabhaga law which recognized such right and that they were influenced by it.[41] Derrett, somewhat surprisingly, gives the explanation that the pundits attached to the courts in Madras and Bombay were of a lesser calibre than those of Bengal.[42] Apart from the value-judgement involved in the view, it is insupportable as the judges consistently based their decisions on equitable principles and not on any opinion of pundits. Approving these judicial trends the Privy Council in Suraj Bunsi Koer v. Sheo Proshad Singh[43] observed:

> There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided Hindu family; and the law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition. . . .

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40. Id. at 440.

41. BHATTACHARYA, supra note 22, at 524.

42. Derrett, Attachments And Alienations of undivided Interests in Marumakkattayam Joint Families, /1966/ KERALA LAW TIMES 29, 37 (Journal).

43. 6 I.A. 88, 102 (1879).

The adaptation of this ancient institution to modern conditions of society involved many contradictions. This is vividly brought out by the following passage in Peramanayakam's Case[44]:

> The touching refrain of the respondent's argument was: 'Overrule me if you please, but at least say something logical and consistent with the Mitakshara doctrine'.
>
> Bluntly I say it is not possible to find a logical solution of an illogical problem.

Some of the difficult issues that arose out of this recognition of the alienee's equity are: (1) At what period the alinee's interest materializes ? Is it at the time of alienation or at the time when partition takes place ? (2) If after alienation a son is born, how the alienor's share is to be computed? (3) If it is found that part of the consideration is utilized for common purposes, can the alienee insist that coparceners should not recover their interest without paying their share of the common burden ?

It is significant that Bhattacharya who criticized the deviation of the Madras and Bombay High Courts from the strict doctrine of the Mitakshara law found one justification for these attitudes.[45] Under the Mitakshara law there is an inherent tendency to create and perpetuate a confusion between ostensible and real ownership of property. Because the father is the manager in most cases, he points out that there is a natural tendency to treat the father as the owner of property;

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44. Supra note 39, at 440.

45. Supra note 22, at 527.

that the agreed for securing the landed property prompts people to purchase property from the father.

However, the strict Mitakshara doctrine that a coparcener cannot alienate his undivided share without the consent of other coparceners prevails in other regions. But this divergence is attributable to the rule of stare decisis and not to any reasons of policy. In Sadabart Prasad Sahu v. Follbash Koer,[46] the leading case on this point in the Northern India, Peacock, J., after noticing the rulings of the Madras and Bombay High Courts to be contrary,[47] observed:

> We are called upon to decide this case according to the Mitakshara law as we find it, and not according to our own views of policy. Whatever our opinions might be, in the absence of the decided cases to which I have referred, I am of opinion that we should not be justified in unsettling the law by overruling that current of authorities by which, for nearly half a century, the law appears to have been settled, and in accordance with the principles of which it appears to have been generally understood and acted upon.

Sadabart's Case was approved by the Privy Council in subsequent decisions.[48]

3. Pious Obligation and Extension of Powers of a Father and the Remedies of his Creditors

The Anglo-Mitakshara law introduced notable changes in the law relating to creditors' remedies. A Mitakshara coparcenary may consist of brothers and their male descendants,[49] or of father, sons

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46. 3 B.L.R. 31 (1869) (F.B.).

47. Id. at 45.

48. Balagobind Das v. Narain Lal, 20 I.A. 116 (1893); Madho Parshad v. Mehrabh Singh, 17 I.A. 194 (1890).

49. Where a coparcenary consists of brothers, a creditor is not entitled to proceed against an undivided interest of the coparcener unless a decree had been obtained and his undivided interest is attached during his lifetime. MULLA, PRINCIPLES OF HINDU LAW 227 (12th ed. Desai 1959).

and their male issues.

Where the coparcenary consists of father and sons, which is the dominant type the extension of the doctrine of pious obligation resulted in the erosion of the principle of community of interest. Under the Hindu law a debt not only creates a legal obligation, but is also considered as a sin. Therefore, a pious obligation is cast on sons, grandsons and great grandsons to discharge the debts of father, grandfather and great grandfather, if the debts are not tainted with illegality or immorality. In Girdharee Lall v. Kantoo Lall[50] the Privy Council held that where a father sold the ancestral property for the discharge of his debts, a son cannot set aside the alienation because of his pious obligation to discharge the debts of the father. Secondly, as the interests of the sons and father in ancestral property were liable for the payment of father's debts, a purchaser under an execution is not bound to go back behind the decree to ascertain whether the court was right in passing the decree. In Deendyal Lal v. Jugdeep Narain Singh,[51] the Privy Council, after noticing that Sadabart's Case left open the question of the rights of a purchaser at an execution sale, came to the conclusion that the law at least in respect of those rights should be the same in the North of India and in Madras and Bombay. In a passage which is a locus classicus on the subject, Lord Hobhouse observed in Mussamut Nonomi Babuasin v. Modun Mohun[52] :

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50. 1 I.A. 321 (1874).

51. 4 I.A. 247 (1877).

52. 13 I.A. 1, 17-18 (1885).

> Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority.

According to the texts of Hindu law, a manager is entitled to alienate the coparcenary property for legal necessities, in a season of distress and for pious purposes.[53] Once again acting under the influence of the theory of pious obligation the Privy Council laid down the principle that a father is entitled to mortgage an ancestral estate for an "antecedent debt". Clarifying these principles in Brij Narain v. Mangla Prasad,[54] Lord Dunedin observed:

> It is probably bootless to speculate as to how these seemingly conflicting principles were allowed to develop. On the one hand there is the general rule of the Mitakshara law that the manager cannot burden the estate for his own purposes. . . . On the other hand there is the obligation of the son to discharge his father's debts, based on the doctrine of pious duty. . . . It is enough to say that both principles are firmly established by long trains of decision, and it certainly occurs to the view that the term "antecedent" debt represents a more or less desparate attempt to reconcile the conflicting principles.

However, it is more accurate to say that the conflicting principles emerged in trying to adjust the Mitakshara law of

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53. For an elucidation of these principles see MAYNE, HINDU LAW AND USAGE 458-72 (11th ed. Aiyar 1953).

54. 51 I.A. 129, 136-37 (1923).

coparcenary to the altered social conditions and to bring it in tune with the established principles of Western jurisprudence like giving protection to a bona fide purchaser for value. In other fields like crimes, contracts civil and criminal procedures, transfer of property and registration of titles the law was based on the principles of common law. Therefore, the interaction of these principles with the Hindu law could not but produce anomalies and inconsistencies. The Privy Council's view of the doctrine of pious obligation is "novel"[55] and departs in a large measure from the original concept in the Hindu law. As pointed out by Muttusami Ayyar, J., in Ponnappa Pillai v. Pappuvayyangar,[56] the obligation laid down in the texts of Hindu law was moral and not legal; that the Hindu kings enforced it in the exercise of their ecclesiastical jurisdiction.[57] He stated:

> As a British Court of Justice, however, declines to exercise ecclesiastical jurisdiction, it is necessary to separate personal duties enforced by Hindu kings and which rest wholly on a spiritual basis from those which, though resting on a religious basis, were enforced as incidents of the right of property.

Even if the above view is not accepted, there is no doubt that the Privy Council brought about great changes in the doctrine

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55. Innes, J., characterized the decision of the Privy Council in Girdharee Lall's Case as novel. See 4 Mad. 1, 14 (1881).

56. 4 Mad. 1 (1881).

57. Id. at 19.

of pious obligation. Sadasiva Aiyar, J., in Armugham Chetty v. Muthu Koundan[58] pointed out that the law relating to debts in the Anglo-Mitakshara law broadened from precedent to precedent and deviated considerably from the original doctrine: First, under the old Hindu law the pious obligation did not arise during the lifetime of the father but only on his death. But the judicial decisions rendered it a present liability. Secondly, the ancient texts laid down that the son had to discharge the debts of the father with interest (but the interest should not exceed the principal amount) even if barred by limitation and even if no ancestral properties were inherited. But under the law as developed by the courts the obligation is subject to the statute of limitation and there is no limitation on the amount of interest recoverable by the creditor; and the obligation is enforceable only if there are ancestral assets in the hands of the sons. Thirdly, the courts held that a voluntary alienation made by a father for discharging an antecedent debt is binding on the sons's shares. Fourthly, the decisions laid down that court sales in execution of a decree against the father alone effect the son's shares

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58. 37 M.L.J. 166, 182-83 (1919) (F.B.).

also. Lastly, the courts drew a distinction between a mortgage debt and a personal debt of the father which was unknown to the Hindu law.

4. Insolvency of the Father

The concept of insolvency is entirely unknown to the Hindu law, for as pointed out by Sen, the liability to discharge the debt under it was "absolute".[59] However, the demands of a progressive society and increased commerce necessitated the introduction of the law of insolvency based on common law. Owing to historical reasons two different Acts provide for these matters: the Presidency Towns Insolvency Act, applicable within the local limits of the cities of Madras, Bombay and Calcutta, and the Provincial Insolvency Act, applicable to mofussil areas, that is to say, in the rest of India.[60] The interaction of the Mitakshara law and the law of insolvency resulted in a further diminution of the rights of the sons. The property of an insolvent for purpose of division among his creditors includes "the capacity to exercise and take proceedings for exercising all such powers in or over or in respect of property as might have

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59. SEN, THE GENERAL PRINCIPLES OF HINDU JURISPRUDENCE 317 (1918).

60. The Presidency-Towns Insolvency Act, 1909; The Provincial Insolvency Act, 1920.

been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge".[61] Though there was no similar provision under the Provincial Insolvency Act, the majority of the High Courts held that such power of the father passed to the Official Receiver.[62] To overcome the interpretation of the Madras High Court to the contrary, an amendment was introduced in 1948 to the Provincial Insolvency Act, 1920, which provides:[63]

> The property of the insolvent shall comprise and shall always be deemed to have comprised also the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge.

Here it will be useful to draw a comparison of the powers of a father under the Dayabhaga law and the Anglo-Mitakshara law. In the former, the father is considered as the absolute owner of property. Mitakshara law, as it stands now, confers on the father the following powers: (1) to alienate the coparcenary property for legal necessity or benefit of the estate which, as pointed out by Derrett, was

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61. The Presidency-Towns Insolvency Act, 1909, sec. 52(2) (b).

62. MULLA, THE LAW OF INSOLVENCY IN INDIA 494 (2nd ed. Bhagawati 1958).

63. The Provincial Insolvency Act, 1920, sec. 28 (A).

enlarged under the Anglo-Hindu law;[64] and (2) alienate it for the discharge of antecedent debts. It is also recognised that a creditor has the right to bring the family property to sale, including the interests of sons, for the debts if the debts are not of an illegal or immoral character. Therefore, insubstance the rights of sons in the Mitakshara coparcenary are two fold: (1) to impeach the debts of the father or execution sales for their recovery or the sales made by the father on the ground that the debts were contracted for illegal or immoral purposes, and (2) to separate from the joint family by a unilateral declaration and take one's share in the joint family property. The first right, though of a substantial character, is negative and calls for its exercise in a special category of cases. On the other hand the decided cases point out that not unoften, unscrupulous fathers after contracting debts, institute proceedings in the name of their adult and minor sons to impeach the character of the debts. As to the second, Desai says, rightly it is submitted: "Though in the Mitakshara law son could ask for partition of the ancestral property of the father, the convention has been he did not

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64. Derrett, The History of the Juridical Framework of the Joint Hindu Family, 6 CONTRIBUTIONS TO INDIAN SOCIOLOGY 17, 40 (1962).

and does not even today demand it."[65] Also, in the Punjab according to the customary law a son cannot demand partition during the lifetime of the father. Generally speaking, owing to notions of filial piety, propriety and family pride the sons do not exercise the above rights available to them under the law.

E. THE ASENDENCY OF INDIVDUALISM IN THE LAW OF JOINT FAMILY

Judicial pronouncements and legislative changes on the topic of separate property of a coparcener, reflected the growing forces of individualism in the society. Of these changes which buttressed the growth of individualism four need specific mention: (1) the expansion of the concept of self-acquired property arising out of the interpretation put by the Privy Council on the conflicting texts of Mitakshara, (2) the enunciation of rules relating to the devolution of self-acquired property which recognised the bonds of affection and sentiments, (3) the recognition of the power of testamentary disposition over the self-acquired properties which was unknown to Hindu law, and (4) The Hindu Gains of Learning Act, 1930. If these

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65. Desai, An Analysis, 4 SOCIOLOGICAL BULLETIN 97, 111 (1955).

individualistic notions had not been assimilated, it seems likely that Mitakshara coparceners would have preferred to separate from the joint families rather than to have their earnings treated as joint property. Failure to realize the importance of these changes gives a misleading impression of the stability of joint family.

1. The Expansion of the Concept of Self-acquired Property

Under the Anglo-Mitakshara law there was no expansion in the concept of self-acquired property and the individual member's power to alienate such self-acquisitions. On the question whether the father possessed the right to alienate his self-acquired immovables, the texts of Mitakshara are conflicting. Referring to this, Mitakshara at one place[66] says:

> [H]e is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained; "Though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They, who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support, no gift or sale should, therefore, be made."

In modern terms the above verse emphasizes to the utmost degree the

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66. MITAKSHARA, supra note 10, ch. I, sec. I, v. 27, p. 255.

social obligation of the father to maintain the members of the family.[67] The power to interdict a sale made by the father which logically follows from the above verse will restrain alienation and hamper commerce.

On the other hand in another section of the same chapter, speaking of a donation made by a father, Mitakshara says: "he [son] has no right of interference if the effects were acquired by the father".[68] Also, section four, clause one, points out:[69]

> Whatever else is acquired by the coparcener himself . . . does not appertain to the heirs. . . . Nor shall he who recovers hereditary property which had been taken away give it up to the parceners. . . .

The Privy Council in Rao Balwant Singh v. Rani Kishori,[70] after referring to the above passages, state that these texts "are apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws".[71] They say:[72]

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67. The Hindu Adoptions and Maintenance Act, 1956, imposes this duty in respect of minor children and unmarried daughters who are unable to maintain themselves. The Hindu Adoptions and Maintenance Act, 1956, sec. 20.

68. MITAKSHARA, supra note 10, Pt. II, ch. I, sec. V, v. 9, 280.

69. MITAKSHARA, supra note 10, Pt. II, ch. I, sec. IV, v. 1, 268.

70. 25 I.A. 54 (1897).

71. Id. at 69.

72. Ibid.

> It is, as their Lordships think, the most reasonable inference that the passage in Section I.belongs to the former class of precepts, and those of Section IV. and Section V. to the latter.

So interpreting, and affirming the decisions rendered by the High Courts, they held that a father under the Mitakshara law could alienate his self-acquired immovables. The interpretation put by the Privy Council on the apparently conflicting texts is not above question. Priyanath Sen with his usual acumen criticizes the judgment of the Privy Council.[73] After discussing the reasoning of the Privy Council in Rao Balwant Singh v. Rani Kishori,[74] he concludes:[75]

> I am not sure that they have not departed from the strict Mitakshara law under a misconception that the distinction between a legal rule and a moral or religious recommendation was not quite familiar to it, a misconception which is all the more inexplicable because in the very section with which they are concerned (viz., chap.I, sec.I) there is ample evidence to show that the distinction was fully recognised and its importance clearly appreciated by the author.

Perhaps, the view of the Privy Council was influenced by a higher consideration, though unconsciously, to mould the law to meet the needs of the society. The "inarticulate major premise" of their

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73. SEN, supra note 59, at 133 et seq.

74. Supra note 70.

75. SEN, supra note 59, at 135.

decisions was frankly stated by Lord Hobhouse in the above case in the following words:[76]

> The controversies and conflicting decisions on the father's powers of mortgage and sale, on the payment of his debts out of the inheritance, and on the testamentary power, will occur to everybody who is familiar with Indian litigations of the past half-century or so. On each of these subjects there has been a growing tendency, coincident with the growth of commerce, to give more effect to the latter of the two principles, namely, the use of property by the living generation or its living heads.

Broadly speaking, the decisions of the Privy Council were favourably received in India.[77] To the criticisms of purists it must be said that the "social engineering" imperceptibly attempted by the decisions was inevitable because, barring the personal laws of the Hindus, Muslims and the Parsis, laws relating to contracts, transfer of property and procedure were codified on the basis of common law. The task of harmonizing the concepts of English jurisprudence with the ancient institutions of Hindu law was left to the courts. The transformation brought about by the judicial legislation in these institutions evoked the warm approval of the lawyers and laymen.

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76. 25 I.A. 54, 71 (1897).

77. Chari, The Hindu Joint Family And the Privy Council, 14 M.L.J. 71 & 105 (1904).

2. Devolution of Separate Property on Intestacy

Equally significant is the impact of decisions relating to the devolution of separate property. In Katama Natchiar v. The Rajah of Shivagunga[78] the question was whether a zamindari, the separate estate of an undivided coparcener, who died without leaving any male issue but only a daughter, should devolve on other male members of the undivided coparcenary, or on the line of succession provided for the separated member under the Mitakshara.[79]

Vijnaneswara, the author of Mitakshara, dealing with the right of the widow and after discussing the conflicting texts on this point, states his conclusion thus:[80]

> [W]hen a man, who was separated from his coheirs and not reunited with them, dies leaving no male issue, his widow (if chaste) takes the estate in the first instance.

The question was characterized by the Privy Council as "one of nicety and some difficulty".[81] Turner, L.J., observed:

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78. 9 M.I.A. 543 (1863).

79. There is a distinction between the terms self-acquired and separate properties. Separate properties are those properties which though not acquired by one's own labour belong exclusively to the owner. For example property inherited from a maternal uncle will be regarded as separate property. But the legal incidents applicable to separate and self-acquired properties are the same.

80. MITAKSHARA, supra note 10, Pt. II, ch. II, sec. I, v. 30, 345.

81. Supra note 78, at 611-12.

> This text, it is true, taken by itself, does not carry the rights of widows to inherit beyond the cases in which their husbands have died in a state of separation from their co-heirs, and leaving no male issue; but it is to be observed that the text is propounded as a qualification of the larger and more general propositions in favour of widows; and, consequently, that in construing it, we have to consider what are the limits of the qualification, rather than what are the limits of the right. Now, the very terms of the text refer to cases in which the whole estate of the deceased has been his separate property, and, indeed, the whole chapter in which the text is contained, seems to deal only with cases in which the property in question has been either wholly the common property of a united family, or wholly the separate property of the deceased husband. We find no trace in it of a case like that before us, in which the property in question may have been in part the common property of a united family, and in part the separate acquisition of the deceased. . . . The text, therefore, does not seem to us to govern this case.
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> There being then no positive text governing the case before us, we must look to the principles of the law to guide us in determining it.

The view taken by the Privy Council was that the separate property will devolve according to the rule of succession provided for the separated member of the coparcenary, that is, the widow, daughter, daughter's son, etc. In other words this decision upholds the rights of the members of conjugal family as against the rule of survivorship existing in favour of the coparceners. The decision is in consonance with the normal wishes of a coparcener in respect of his property and whose affection will be more for his wife and daughters than for his brothers.

Though the decisions of the Privy Council apparently gives an impression that they deduced the rule from general principles, it constitutes a considerable innovation in law. Only a month before the judgment in the Shivagunga Case[82] Frere and Holloway, JJ., in Varadiperumal Udaiyan v. Ardanari Udaiyan,[83] held that on the death of an undivided coparcener without issue his separate property will devolve on his brothers. Holloway, J., even ridiculed the argument of the appellant to the contrary as coming within Lord Denman's category of law taken for granted.[84]

3. Recognition of the Testamentary Power

In the words of Mayne, "the origin and growth of the testamentary power among Hindus had always been a perplexity to lawyers."[85] For, the native languages do not even have a word to express the idea.[86] However, under the influence of English concepts the father's power to dispose of his property by will was first

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82. Supra note 78.

83. 1 M.H.C.R. 412 (1863).

84. Id. at 414.

85. MAYNE, supra note 15, at 566.

86. Nagalutchmee Ummal v. Gopoo Nadaraja Chetty, 6 M.I.A. 309, 344 (1856).

recognized in Bengal, where the father's power of disposition was absolute. The right to dispose of property by a will added a new dimension to the pre-existing powers of disposition under the Hindu law. In two respects the recognition of this power under the Mitakshara law constitutes a triumph for individualistic concepts of property and the consequent erosion of joint family property. The first is the recognition of the power of disposition over the self-acquired property, and the second is the extension of the right even over the joint properties, if a coparcener had severed his joint status by means of a unilateral declaration of an intention to separate. Mayne refers to the ripening of the power to devise as "the downfall of the common law of property in India".[87]

The testamentary power over self-acquired property was authoritatively laid down by the Privy Council, so far as Madras is concerned, in Mulraz Lachmia v. Chalekany Vencata Rama Jagganadha Row[88] where the view of the Sudder court that the disposition of the property under a will was held to be valid. It is worthy of note that the pundits of the Sudder court to whom the question was addressed relied upon the texts of Hindu law which dealt with the power to make

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87. MAYNE, supra note 15, at 339.

88. 2 M.I.A. 54 (1838).

a gift inter vivos of property. Therefore, strictly speaking the recognition of this power in Madras rested on a misapprehension. This power was further extended to ancestral property also in Nagalutchmee Ummal v. Gopoo Nadaraja Chetty[89] where the deceased was a sole surviving coparcener. Similar development took place in Bombay also. So far as the rest of India is concerned the power of testamentary disposition over self-acquisitions in the Mitakshara law was authoritatively laid down in Rao Balwant Singh v. Rani Kishori.[90] Referring to Rani Kishori's Case Derrett says it is "accepted in India without hesitation, though it is technically wrong."[91]

4. Gains of Learning

In an agrarian society where the main occupations of the people were farming and business the concept that property belongs to the male members of the family jointly and not individually is logical, for the members collectively assist towards its acquisition. In practical terms it is also difficult to assess the contributions of individual members. Therefore, the concept of separate property of

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89. 6 M.I.A. 309 (1856).

90. 25 I.A. 54 (1897).

91. Derrett, The History of The Juridical Framework of The Joint Hindu Family, 6 CONTRIBUTIONS TO INDIAN SOCIOLOGY 17, 32 & n. 53 (1962).

a member of joint family is one of slow growth.[92] Even in early times the first inroad in the notion that the property belongs to the family and not to the individual was made by the recognition of gains of learning.[93] Yajnavalkya[94] states thus:

> Whatever is acquired by a person himself without detriment to or expenditure of paternal wealth, gifts from freinds, gifts at marriage, these are not liable to be divided among a man's coparceners; similarly he who recovers ancestral property lost to the family (and not recovered by the father and others) would not have to share it at a partition with his coparceners nor his gains of learning.

As pointed out by Kane, the gains of learning was the subject of great changes from the earliest to the modern times.[95]

In the nineteenth century during the period of British administration of justice questions relating to the gains of learning came before the Privy Council for decision. In Pauliem Valloo v. Pauliem Sooryah,[96] it was contended that if a member of joint family receives any education whatever from the joint family funds, he becomes forever after incapable of acquiring by his own skill and industry any

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92. 3 KANE, HISTORY OF DHARMASASTRA 578 (1946).

93. Ibid.

94. Yajnavalkya, II, 118-19.

95. 3 KANE, supra note 92, at 581.

96. 4 I.A. 109 (1877).

separate property. The Privy Council characterized the proposition as "somewhat startling" and declined to consider it. The observations of the Privy Council, however, indicated that it was not in agreement with such an interpretation of the texts of Hindu law. In Metharam Ramrakhimmal v. Rewachand Ramrakiomal,[97] one Shewaram, a member of a Mitakshara joint family received an ordinary education at the expense of joint family. He subsequently worked as clerk to a pleader and afterwards as a broker. The Privy Council held that as he received ordinary education suitable to his family his earnings constituted his own separate property. Thus the Privy Council drew a distinction between ordinary education and special education received by a member of the joint family. This distinction was brought to a sharper focus in Gokalchand v. Hukum Chand Nathu Mal.[98] There Gokal Chand received education in England for seven years which enabled him to pass the Indian Civil Service Examination. It was held that his earnings constituted properties which were partible among the members of the family and therefore, liable for the debts of the family; that

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97. 45 I.A. 41 (1917).

98. 48 I.A. 162 (1921).

the education he received was a specialized education. Their Lordships noticed the anomaly arising from the decision and observed:[99]

> It may be difficult to see now why the anomaly should have arisen, by which the gains of a man's own labour or of his, own bargains are impartible, because they are the fruits of his own effort, while the gains of his science are partible, though they are the fruits of his effort too. In each case the member of the joint family is indebted to the family funds for something; in the former for the nurture, which has made him strong to labour, in the latter for professional education in addition. . . .
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> Their Lordships are fully alive to the incongruity, more striking perhaps to Western than to Indian minds, of applying to such an occupation as Mr. Gokal Chand's an ancient rule which had its origin in a state of society possibly simpler than and certainly different from the state of society existing in the present day, but this anomaly proceeds largely from the Occidental habit of relying on a mere analogy in the application of legal rule instead of deducing the application from a logical apprehension of the principle as the best Eastern thinkers do. Be this as it may, they conceive it to be of the highest importance that no variations or uncertainties should be introduced into the established and widely recognised laws. . . .

But it is to be noted that quite early the educated sections of the Hindu community, especially in the Province of Madras, sought to protect the gains of learning by making it as the separate property of the individual. In 1891 Honourable Bhashyam Ayyangar introduced a Bill to effect a change in the law. Though the Bill was passed by the Legislative Council, the Governor vetoed the Bill in 1900. The legal

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99. Id. at 173-74.

profession in Madras was strongly in favour of such a move.[100] After the decision of the Privy Council in Gokalchand's Case the move was once again afoot to change the law which resulted in the passing of the Central legislation, The Hindu Gains of Learning Act, 1930. This enactment which is retrospective in its operation provides inter alia that no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by reason of learning having been imparted to him by a member of the joint family or with the aid of joint family funds.[101]

F. STATUTORY LIMITATIONS ON THE PRINCIPLE OF SURVIVORSHIP

In the Shivagunga Case[102] three essential features of a Mitakshara coparcenary were stated, namely, community of interest, unity of possession and the right of survivorship. They also distinguish a Mitakshara coparcenary from a Dayabhaga coparcenary. Of these features community of interest and unity of possession were

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100. The Hindu Gains of Learning Bill, 10 M.L.J. 1 (1900).

101. The Hindu Gains of Learning Act, 1930, sec. 3.

102. Supra note 78.

largely annihilated by factors like the extension of the powers of a manager under the Anglo-Mitakshara law,[103] the father's power to alienate the joint family property for the discharge of antecedent debts and socilogical factors which render separation in food a common feature. The clear recognition of the powers of a manager of a joint family rendered the concept of community of interest and unity of possession theoretical, where the joint family consisted of brothers, as well as where the joint family consisted of father and his sons. In the former case, the functional powers exercised by a manager rendered the powers of junior members insubstantial and in the latter case made the father the de facto owner of the joint family property. The only concrete manifestation of the continuance of the coparcenary is the existence of the right of survivorship. Thus, according to the Mitakshara law prior to 1937, if an undivided coparcener died leaving a widow and no male issue (that is, son, son's son and son's son's son) his widow was entitled to a right of maintenance only and his interest devolved on the other coparceners by survivorship. This position recalls to the mind the observation that in primitive legal systems, the rights of genetic relations were stronger than those of the spouse.[104]

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103. Derrett, The History of The Juridical Framework Of the Joint Hindu Family, 6 CONTRIBUTIONS TO INDIAN SOCIOLOGY 17, 38-42 (1962).

104. Hoebel, The Anthropology of Inheritance, in SOCIAL MEANING OF LEGAL CONCEPTS 17 (Cahn ed. 1948).

But the social conditions emphasized the need for the recognition of the rights of inheritance of the widow. There was a definite shift in preference from the agnatic kindred to the members in the nuclear family group. The discontinuance of child marriages and the increase in the education of women are steadily accelerating this trend throughout India. Viewed from the aspect of need, the claims of the widow and daughters deserve priority over those of the brothers and nephews. The test of natural love and affection of the deceased will also demonstrate that the spouse and children, whether sons or daughters, are entitled to first preference. When a son was adopted, not infrequently he neglected the adoptive mother and her daughters. The legislature taking into account the views prevailing in the Hindu community enacted the Hindu Women's Rights to Property Act, 1937, to give better rights of inheritance to the widow, the widow of a predeceased son and the widow of a predeceased son of a predeceased son.[105] It was provided:[106]

> When a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

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105. The Hindu Women's Rights to Property Act, 1937.

106. The Hindu Women's Rights to Property Act, 1937, sec. 3, sub-section (2).

The Act had some drawbacks. First, the legislation was not applicable to agricultural lands as the Federal legislature was not competent to legislate in respect of devolution of agricultural lands. Second, the interest of the widow under the Act was a limited interest known as the Hindu widow's estate. Third, the position of a daughter of the deceased coparcener was not improved. Nonetheless, the enactment is significant in that it prevented the operation of the principle of survivorship during the lifetime of the widow. The breach thus created in the principle of survivorship is further widened under the provisions of the Hindu Succession Act, 1956. According to the proviso to section 6 of the Act if a deceased left any female heir mentioned in class I of the Schedule[107] or any male relative claiming through such female heir, his undivided interest in the coparcenary will devolve according to the provisions of testamentary and intestate succession laid down under the Act, and not by the rule of survivorship.[108]

All these changes portrary that the legislative attempt to retain the superstructure of the Mitakshara coparcenary is misconceived

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107. The heirs mentioned in class I of the Schedule are: Son; daughter widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son.

108. The Hindu Succession Act, 1956, sec. 6.

and is a concession to the conservatism of the upper castes, especially of those coming from the Northern states of Bihar, Uttar Pradesh and Rajasthan. Kane supporting the recommendation of the Rau Committee to abolish the right by birth observes:[109]

> And the unification of Hindu Law will be helped by the abolition of the right by birth which is the cornerstone of the Mitakshara school and which the draft Hindu Code seeks to abolish. Many people are vehemently opposed to the change. But they forget that, what with the rule that any member of a joint Hindu family may alienate his interest for value, what with the Gains of Learning Act, the Hindu Women's Rights to Property Act and other enactments, the real core of the ancient Hindu family system has been removed and only the other moribund shell remains. . . .

G. FUNCTIONAL ASPECTS OF THE MITAKSHARA COPARCENARY

Many members who voiced their opposition to the abolition of the Mitakshara coparcenary stated that the beneficial features of the institution will disappear by the conversion of the Mitakshara into a Dayabhaga coparcenary. Especially it is said that in a joint family there is mutual help and aid among the members in times of need and that disabled members are protected under the system. In other words,

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109. 3 KANE, HISTORY OF DHARMASASTRA 823 (1946).

they argue, a joint family discharges the welfare function comparable to social security in the West and this function will stand to lose with abolition of the Mitakshara coparcenary. This argument, if correct, needs careful consideration. Secondly, it is argued that abolition will adversely affect the business conducted by a joint family. We will now attempt to show that the beneficial features of the joint family system will not be affected by the adoption of the recommendation of the Rau Committee.

A fundamental misconception behind these arguments stems from a failure to distinguish between a joint family and a coparcenary. "A joint Hindu family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters."[110] A Hindu coparcenary which is a creature of law includes only those male members who take by birth an interest in the coparcenary property.

It is generally acknowledged that despite the seemingly wide gulf between the Mitakshara and the Dayabhaga laws, functionally and sociologically the joint families are alike in both the systems. Ross says: "[I]t seems evident that the joint family system will have

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110. MULLA, PRINCIPLES OF HINDU LAW 240 (13th Desai ed. 1966).

111. ROSS, THE HINDU FAMILY IN ITS URBAN SETTING 7 (1961).

a similar basic structure in all parts of India." Further, even among converts to Islam and Christianity the same kinship patterns exist. Echoing the view that family patterns will not change because of the changes in law, Acharya Kripalani, a respected leader in the country, stated:[112]

> I come from a community where there is no joint family, where as soon as the son is married, he separates and lives alone, but I know because there is no joint family, there is greater love between the members of the family . . . and it was manifested recently when the Sindhis had to migrate from Sind and come to India... . So, this family love which has persisted for centuries is not going to end because there is a little change in the Hindu law.

N.C. Chatterjee, a knowledgeable jurist said:[113]

> After all, for all practical purposes, I can assure the House that as between Mitakshara joint family and the Dayabhaga joint family, there is no fundamental difference in practice.

It would also appear that in many areas among peasants, who do not stand high in the caste hierarchy, the practice of a son separating on marriage is fairly common.[114] Therefore, the argument that alteration in the mode in which the property is held will disrupt the joint family, strongly suggests a bias in favour of the institutions of the higher castes and propertied classes.

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112. Constituent Assembly Debates (Legislative) dated 14th December, 1949 (p. 561).

113. /1955/ 4 Lok Sabha Debates, col. 8131.

114. Constituent Assembly Debates (Legislative) dated 12th December, 1949 (p. 481).

The other argument that the conversion of the Mitakshara coparcenary into a Dayabhaga coparcenary will adversely affect business interests is equally unconvincing. The Rau Committee refuted the argument thus:[115]

> It is certainly not the case that businesses conducted by Muslims, Parsis, or Englishmen have suffered from the fact that they do not have the Mitakshara joint family system. One of the most progressive commercial communities in the southern districts of the Madras Presidency is the Nattukottai Chettiar community and their commercial enterprise was attributed by the late Mr. S. Srinivasa Iyenger "to their ideas of the legal relations of the members of their family which approximate more to a partnership than those of a Brahmin joint family."

On the other hand it can certainly be said that the Mitakshara coparcenary is unsuited to modern conditions. For, it was more suited to the needs of ancient rural communities whose main property was land. As pointed out by Mr. Santhanam during the debates on the Hindu Code:[116]

> But we are fast evolving out of that primitive community into a modern community in which property goes from the immovable to the movable property. You have immovable properties diminishing and movable properties increasing. Even immovable property is being converted to moveable property, in the form of shares, cash savings, deposits and government securities and other things. Therefore, we should adopt that system which is in tune with these changes from the tangible immovable property to intangible and notional property. Where property is largely intangible, this right by birth is really impracticable.

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115. REPORT OF THE HINDU LAW COMMITTEE 14 (1955 reprint).

116. Constituent Assembly Debates (Legislative) dated 12th December, 1949 (p. 480).

CONCLUSION

The main obstacle in achieving equal rights of inheritance for women under the Mitakshara law is the existence of the right by birth in favour of a son, son's son and son's son's son. Though the Rau Committee recommended the abolition of Mitakshara coparcenary, the legislature retained it. Its continuance is in effect a concession to the conservatism of the upper castes who dominated the legislature then. The sentiment in support of the joint family or rather the Mitakshara coparcenary is misconceived. The present social conditions render the presumption that a Hindu family is joint in food, worship and estate obsolete. The characteristics of the Mitakshara coparcenary, namely, community of interest, unity of possession and right of survivorship were eroded by altered social conditions, judicial decisions and legislations. The essence and spirit of the ancient Mitakshara coparcenary no longer exists. The arguments in its favour are valid, if at all, among the upper castes engaged in business and farming. Besides, the right is an obstruction to free alienation of property. To promote equality of sexes, the right by birth in the Hindu law should be abolished.

CHAPTER TWO

THE HINDU SUCCESSION ACT AND WOMEN'S RIGHTS OF INHERITANCE

Introduction

The basic feature of inequality that arises from the retention of right by birth was discussed in Chapter One. In this chapter we will examine certain other aspects of discrimination under the Hindu Succession Act in respect of Women's rights of inheritance.

Though the Hindu Succession Act, 1956 purports to lay down a uniform law of succession, yet there are divergent rules of succession in the Act. These are : (1) section 4 (2) which preserves provisions relating to the devolution of tenancy rights under the legislations of the States;[1] (2) section 6 which deals with the devolution of interests in Mitakshara coparcenary, (3) section 7 applicable to properties governed by the Marumakattayam law, (4) section 8 which governs the Dayabhaga law and the separate and self-acquired properties under the Mitakshara law, and (5) section 15 which applies to succession of the properties of female Hindus. Among these

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1. The Hindu Succession Act, 1956, section 4 (2).

sections 6 and 7 primarily deal with the ascertainment of the share of a deceased coparcener under the Mitakshara law and of the share of a person who has an interest in a tarwad, tawazhi, or illom.[2] The shares thus ascertained will devolve according to section 8 of the Act. Therefore, in effect we find three types of rules of succession: first devolution of tenures which are left untouched by the Act; second, rules of succession under section 8; and third, rules of succession mentioned in section 15. Under section 15 the property of a female Hindu dying intestate will devolve in the first instance upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband.[3] Thus this section achieves equality of sexes in the rights of inheritance in a satisfactory manner. The rules of devolution of tenancies in section 4 and the rules relating to intestacy in section 8, therefore, need emphasis.

A. DEVOLUTION OF TENANCIES

Section 4 (2) of the Hindu Succession Act, 1956 provides:

> For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings.

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2. See Glossary.

3. The Hindu Succession Act, 1956 sec. 15 (1) (a).

The apparent object of section 4 (2) is to protect the rules in state legislations from the over-riding effect of the Hindu Succession Act, which otherwise would have governed the succession to tenurial interests. The reasons behind this exemption, as they appear from the legislative debates are two fold.[4] First, tenancy laws, being property laws, apply to all whether a Hindu or non-Hindu. As the Hindu Succession Act is a personal law, it should not override the provisions of a property law enacted in the interests of agricultural economy of the country. Secondly, the states are responsible for agricultural laws and the Central Government is anxious not to encroach on the rights of the State Governments.

A serious objection is that the beneficial effects of the Hindu Succession Act can be denied by a subtle resort to this provision. The policy behind section 4 (2) is open to question, for, the bulk of the property in India is agricultural property and such an exemption detracts from the principle of uniformity. It may also be noted that the Act does not define the word "tenancy rights" nor is it defined in the General Clauses Act, 1897. Thus, on the question

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4. [1956] 4 Lok Sabha Debates, cols. 6970-71.

as to what constitute tenancy rights, the last resort must be had to the specific legislation of the State itself, and it is quite conceivable that a state with dominant conservative groups (for example Haryana) could defeat the purpose of the Act by defining tenancy rights to include all interests arising in or out of agricultural lands.

So far as the present writer could discern, no particular economic justification was made out by the state or states concerned for having separate rules for devolution of tenancies. The fact that many states do not have special provisions for succession to tenurial interests and the fact that the exception protects legislations in some states in the North, gives rise to a suspicion that it was intended as a concession to the conservative elements in these regions. The argument that the Act is a personal law and that it cannot override a property law ignores, it is submitted, two aspects: first, that in pith and substance a law providing for devolution of tenancies is a law relating to succession, and secondly that these special laws may contain features which are more

discriminatory than the existing Hindu and Muslim laws.[5]

The legislation in Uttar Pradesh, a state which comprises one-sixth of India's population, furnishes an example of this kind. Section 171 of the U.P. Zamindari Abolition and Land Reforms Act dealing with devolution of a holding on intestacy says :[6]

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5. Three types of approaches are to be found in the existing state legislations on the question of devolution of tenancies. First, those that contain special provisions relating to devolution of tenancies, e.g. section 171 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act. Second, those that specifically apply the "personal law" such as section 40 of the Rajasthan Tenancy Act, 1955. Third, those that do not provide for any special rules for the devolution of tenancies like Madras and Maharashtra.

   Of these the last approach does not present any special problems except that the inadequacies of the Hindu Succession Act are automatically incorporated. The second approach is also unobjectionable except that sometimes the question may arise whether the words "personal law" refer to law applicable at the time when the statute dealing with the devolution of tenancy was passed or the law currently in force, that is, the Hindu Succession Act, although in some states this aspect has been authoratively decided by the courts; Ramlali v. Bhagunti Bai, A.I.R. 1968 M.P. 247. However, the first approach seriously hinders the effectiveness of the operation of the beneficial results of the Act as compared to the law before 1956 and militates against giving better rights to women.

6. The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, sec. 171.

[W]hen a bhumidhar, sirdar or asami[7] being a male dies, his interest in his holding shall devolve in accordance with the order of succession given below :

(a) the male descendant in the male line of descent in equal shares per stirpes :

Provided firstly that the son of a predeceased son how-low-so-ever shall inherit the share which would have been devolved upon the predeceased son, had he been alive :

Provided secondly that, subject to the provisions of the first proviso, the share of the predeceased male lineal descendant will devolve upon his widow, who has not remarried, and

Provided thirdly that if no male lineal descendant in the male line of descent is alive, the inheritance shall be governed by the clause (b);

(b) widow and widowed mother and widow of a predeceased male lineal descendant in the male line of descent, who have not remarried :

Provided firstly that co-widows will together get one share, and

Provided secondly that the widow of a nearer descendant will exclude that of a remoter in the same branch;

(c) [Deleted]

(d) father;

(e) [Deleted:]

(ee) unmarried daughter.

The above scheme of inheritance shows a strong preference

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7. See Glossary.

for succession among agnates with a priority in favour of males in that group. In competition with a son the widow of a deceased is not entitled to succeed. Where the deceased leaves sons through his pre-deceased first wife and his widow, in many cases there will be considerable hardship to the widow. A widow and unmarried and married daughters are postponed not only by the lineal male descendants in the male line of descent but even by the widows (who have not remarried) of those males. The exclusion of the widow and the daughters cannot be justified even on a functional basis because they are not altogether excluded from the category of heirs.

The seriousness of the problem is underscored by the fact that section 171 is likely to apply to all the agricultural land in the course of time in Uttar Pradesh. The statement of Objects and Reasons of the Uttar Pradesh Zamindari Act says [8]: "It is expected that the vast majority of cultivators will become bhumidars. The present intermediaries in respect of their sir, khudkasht and groves will be classed as bhumidars." An important source of difficulty is the classification as bhumidars of persons paying land revenue. This may be contrasted with the position in Madhya Pradesh. It is a

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8. Supra note 6, The Objects and Reasons.

mismoner to call a bhumidar a holder of a tenancy for according to section 241 of the U.P. Act, the liability of a bhumidar is to pay land revenue to the Government and not rent.[9] In Ramlali v. Bhagunti Bai,[10] it was contended that a bhuswami or a bhumidari is a holder of a tenure under the Madhya Pradesh Land Revenue Code, and therefore, the Hindu Succession Act was inapplicable. The Madhya Pradesh High Court (Chief Justice Dixit) rejected the contention stating: "It is important to note that a Bhumiswami or a Bhumidhari pays land revenue and not rent."[11] It was held that section 151 of the Madhya Pradesh Code in no way saves the devolutions of bhumidari and bhuswami rights and that the provisions of the Hindu Succession Act should be applied.

It is submitted that in the interests of uniformity and also for achieving the social equality of women, the exception provided in section 4 (2) of the Hindu Succession Act saving the special rules relating to devolution of tenancies Act saving the special rules relating to devolution of tenancies should be abolished. As a preliminary step, the word tenancy should be defined so as to exclude all persons paying land revenue to the Government. As soon as the

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9. The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 sec. 241.

10. A.I.R. 1968 M.P. 247.

11. Id. at 251.

abolition of intermediaries is achieved, the application of section 4 (2) to special provisions relating to the devolution of tenancies should be abolished.

B. FURTHER CONSIDERATION OF SECTION 6 OF THE HINDU SUCCESSION ACT

The consideration of policy behind the retention of the right by birth were dealt with in Chapter One. In addition section 6 is defective: (2) owing to errors in drafting and (b) because of its failure to correlate the codified and the uncodified parts of Hindu law.

Section 6 initially states that where the deceased governed by the Mitakshara law dies leaving an interest in coparcenary, his undivided interest will devolve according to the rule of survivorship and not according to the Act. But as such a provision will drastically affect the rights of female members to inherit properties, the proviso to the section laid down that if the deceased had left behind any female relatives mentioned in class I of the Schedule or male relatives claiming through such female relatives the interest of the deceased will devolve not by survivorship but by testamentary or intestate succession as provided by section 8 of the Act.[12]

Problems Arising out of Incorporation of the Uncodified law of Partition and Errors in Drafting

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12. The Hindu Succession Act, 1956, sec. 6.

For purposes of ascertaining the share of a deceased coparcener, Explanation I to section 6 provides that we should assume that a partition of the property had taken effect immediately before his death. In so providing the legislature seems to have overlooked that under the uncodified law of partition in the North when there is a partition between the father and sons, the father's wife is given a share equal to that of a son. The rights of female members for a share at a partition stem from two texts of Yajnavalkya. Referring to a partition between father and sons, it is stated:[13] "If he (father) makes the allotments equal, his wives, to whom no separate property had been given by the husband or the father-in-law must be rendered partakers of like portion." In the case of a partition between the sons after the demise of the father, it is laid down:[14] "Of heirs dividing after the death of the father, let the mother also take an equal share." According to the judicial interpretation a female member will be a limited owner[15] in respect of such share alloted to her.[16] On the other hand, in the Southern States of Madras, Mysore (except in certain areas) and Andhra

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13. THE VYAVAHARA MAYUKHA 43, citing YAJNAVALKYA Pt. II, v. 115 (Borradaile Trans. 1879).

14. Id. at 44, citing YAJNAVALKYA Pt. II, v. 123.

15. Before 1956 a female heir inheriting properties took a limited estate. They could not alienate property except in cases of legal necessity or benefit of the estate.

16. Debi Mangal Prasad Singh v. Mahadeo Prasad Singh, 39 I.A. 121 (1911).

the allotment of shares to female members at a partition became obsolete. Mulla and Derrett suggest a literal construction of the words "if a partition of property had taken place immediately before his death" in Explanation I to section 6. This view will give rise to an anomaly.[17] For example, if the deceased died leaving a widow, a son and a daughter, then in the North under a notional partition of the coparcenary property, the father, son and the mother will each be entitled to share and the one-third share of the deceased will become distributable under the Act among the class I heirs. Thus, the successional share of the widow will be one-ninth and of the daughter will be one-ninth. Whereas in the South under the notional partition the property will be divisible between the father and the son, and therefore, the share of the deceased in the notional partition will be one-half, which becomes distributable among the widow, son and daughter. In this case the share of the widow and the daughter will be one-sixth each under the Act.

The point that is to be noticed is that the share of the daughter will be reduced by making an allotment to a female member under the notional partition. The position arising under the literal construction might have been unobjectionable if the widow would be

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17. MULLA, PRINCIPLES OF HINDU LAW 933 (12th ed. Desai 1959). DERRETT, INTRODUCTION TO MODERN HINDU LAW sec. 598 (1963).

entitled to the share allotable to her at a subsequent partition in all events. But it is a matter of considerable doubt whether she would be entitled to a further share at a subsequent partition in addition to her successional share,[18] for, the judicial decisions hold that the share allotable to a mother at a partition between the sons is in lieu of maintenance[19] to which she is entitled from the joint family properties. The Hindu law relating to maintenance was codified in 1956 and it is quite likely that the courts may hold that the right at a partition under the general Hindu law is thereby abrogated as this Act contains specific provisions relating to the right of maintenance. Even if it be otherwise, her right to such a share can be defeated by merely postponing partition. For, according to the decision of the Privy Council, which was followed without any reservation by the Indian High Courts before the passing of the Hindu Succession Act, she will be entitled to share only if an actual partition takes place.[20]

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18. Shivaramayya, Ascertainment of a Deceased Coparcener's share, 67 BOMBAY LAW REPORTER 65 (JOURNAL).

19. Shiv Dyal Tewaree v. Judonath Tewaree, 9 W.R. 61 (1868); Shrimati Hemangini Dasi v. Kedar Nath Kundu Chowdhry 16 I.A. 115 (1889), a Dayabhaga case. Also refer to the observations of Shah, J., in Munnalal v. Rajkumar, A.I.R. 1962 S.C. 1493, 1500.

20. Pratapmull Agarwalla v. Dhanabati Bibi, 63 I.A. 33 (1935). This decision was over-ruled in its application to section 14 of the Hindu Succession Act, by the Supreme Court in Munna Lal v. Raj Kumar, A.I.R. 1962 S.C. 1493. However, it would seem that the general principle in the law of partition as laid down by the Privy Council is unaffected by the decision of the Supreme Court.

As will be noticed presently, if the deceased died leaving only one son through his first wife, and his second wife and her daughters as heirs, the actual partition which entitles the mother to partake a share cannot occur. The literal construction will result in injustice to the widow and daughters, because while their shares are reduced on the assumption of a notional partition, no share, even if allotable, will accrue to the widow as there is only one son and a division among the sons referred to under the texts of Hindu law cannot take place. Further, the Hindu law texts lay down that if the mother has her own stridhana it should be deducted from her share.[21] The difficulties in section 6 were revealed by the judicial decisions and the vacillations of the Bombay High Court in construing the section.

In Shiramabai v. Kalgonda,[22] one Bhimgonda died leaving his widow, a son and three daughters by his predeceased wife. The widow filed a suit for partition and possession of her share in properties one-third (on partition) and one-fifteenth (on succession), that is, two-fifths. The son contended, perhaps labouring under a misapprehension,[23] that she is entitled to a one-tenth share. The

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21. THE VYAVAHARA MAYUKHA, supra note 13, at 43.

22. A.I.R. 1964 BOM. 263.

23. It may be stated that strictly the contention should have been that she is entitled to one-fifteenth share.

District Judge held that the widow was entitled to a one-fifteenth share but in view of the defendant's admission it was decreed that she was entitled to one-tenth. On appeal the Bombay High Court upheld the decision of the District Judge on a different ground. They held that the interest of the deceased under the notional partition should be ascertained without taking into account the shares that will be alloted to female members on actual partition.

In Shiramabai's Case, it is to be noted in particular that the widow will never be entitled to her share on partition as the deceased left behind only one son and therefore, an actual partition between sons which entitles a mother or a step-mother to take a share cannot occur. Patel, J.,[24] observed :

> It must be noticed that the section does not provide for actual partition at first as at death, and allotment of shares to the sharers and then for division of the property falling to the share of the deceased coparcener amongst his heirs. The anomaly, therefore, would be that 1/3 rd share which would go to the mother on actual partition she will not get, as there is not a partition during the life-time of father, nor does the section so provide and it will remain with the son and the widow and daughters will get a share only out of 1/3rd of the entire property.

Shiramabai's Case was criticized for departing from the literal

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24. Id. at 263.

construction[25] and was defended on the ground that it avoids complexity in law and injustice to female heirs like daughters.[26]

Surprisingly enough, Patel, J., in Rangubai v. Laxman[27] overruled his own decision in Shiramabai's Case. In so doing, he resorted to a strained construction of section 6 but obviated the hardship that arises out of the fact that a mother will not be in a position to claim her share on partition. For this purpose he relied on an extension of the ratio of the decision of Supreme Court in Munna Lal v. Raj Kumar.[28] There it was held that if a preliminary decree was obtained in a suit for partition and the female sharer died during the pendency of appeal, the share alloted to her will be deemed to be absolute property under section 14 of the Hindu Succession Act.

In Rangubai's Case, one Lalji Manaji, the husband of Rangu Bai adopted Laxman. Lalji died as a member of joint family consisting of himself, the widow and the adopted son. After the husband's death,

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25. Derrett, The Ascertainment of a Deceased Coparcener's Share, 66 BOMBAY LAW REPORTER 169 (JOURNAL).

26. Supra note 18.

27. A.I.R. 1966 BOM. 169.

28. A.I.R. 1962 S.C. 1493.

the widow brought a suit claiming a half-share in the joint family properties. The defendant contended that the plaintiff would be entitled to a one-sixth share. The learned judge after discussing the law on the subject rightly came to the conclusion that her right to a share is a right in the property of the coparcenary. Relying on the decision in Munna Lal's Case he concluded that "the legal fiction of partition and separation of the share of the deceased coparcener at his death must be carried to its logical conclusion".[29] It was held that the widow was entitled to her one-third share on partition and her one-sixth share on succession. Rangubai's Case was followed by the Orissa High Court in Ananda Naik v. Haribandhu Naik[30] where the dispute was between the children of the deceased through a predeceased wife and the widow and her children.

The decision in Rangubai's Case, though laudable in its attempt to mitigate a hardship arising out of hasty and uncoordinated legislation, is open to criticism. First, the Hindu Succession Act cannot be taken as affecting the law of partition in any way. The notional partition envisaged in section 6 is only for the purpose of ascertaining the successional shares of the heirs of the deceased.

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29. Supra note 27, at 173.

30. A.I.R. 1967 Ori. 194.

The second objection is that it augments the share of the widow of the deceased and indirectly affects the shares of the daughters. For example, in Rangubai's Case, if the deceased left a daughter as an heir in addition her share would have been one-ninth, the one-third share of the deceased on notional partition being distributed among the son, widow and daughter. According to the Mithila sub-school at a partition even a paternal grandmother is also entitled to a share.[31] This will further reduce the share available to a daughter.

In the above case, if the mother of the deceased were to be alive, then under the Mithila law the share of the deceased on a notional partition would have been one-fourth. This would have been distributed among the widow, mother, son and daughter, thereby entitling the daughter to get only a one-sixteenth share, whereas the other heirs would each be entitled to a one-fourth share on partition and one-sixteenth on succession.

Yet another strained construction of the section was resorted to by the Mysore High Court in Sidrappa v. Laxmi Bai[32] to overcome the hardship arising out of the distribution of shares. There a joint

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31. Krishna Lal v. Nandeshwar A.I.R. 1918 Pat. 91.

32. [1965] 1 MYSORE L.J. 625.

family consisted of one "B" and his two sons "J" and "S". "B" died in 1923 leaving his widow, "W". In 1961 "J" died leaving two widows "W1" and "W2" who sued for possession and partition of a half-share of the properties. According to the rule of Hindu law applicable to the parties, if a partition of the properties had taken place immediately before the death of "J" between "J" and "S", "W" will be entitled to a one-third share as the mother takes an equal share with a son. The one-third share which "J" would have taken, will devolve on the class I heirs as follows: "W" as mother of "J" will take one half and "W1" and "W2" will share the remaining half, as the intestate's widow and if there are more widows than one, all the widows together will take one share.[33] Somanatha Iyer, J.,[34] relied on the language of Explanation II to section 6 and stated that as the mother is entitled to a share on partition, she would not again be entitled to a share on succession.[35] He observed :

> If for the quantification of the interest of Jagadevappa [J] which devolves by intestate succession, an allotment is made to his mother and it is by that process that the interest of Jagadevappa [J] is so deduced for the very purpose of determining what passes by intestate succession, the fact that an allotment is made to his mother in that way cannot be disregarded or overlooked for purposes of the exclusion for which Expln. II provides. . . .

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33. The Hindu Succession Act, 1956, section 10, Rule 1.

34. Explanation II to section 6 says: "Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred therein."

35. Supra note 32, at 632.

> Any other view would lead to the incongruous result that while the two widows of Jagadevappa [J] would be entitled to no more than a sixth share and Jagadevappa's brother Siddaramappa [S] would be entitled to only a third share, the mother would be entitled to a half share very much in excess of the share of her son and of the surviving widows of her deceased son.

Thus, in the result it was held that the entire share of Jagadevappa [J] would devolve on his widows.

Mulla's and Derrett's views are highly restrictive of women's rights of inheritance; they fail to limit the operation of a legal fiction so as to avoid unjust results and do violence to the principal purpose of the Act, namely, to achieve uniformity in law in all regions following the Mitakshara law. The view taken by the Bombay High Court in Shiramabai's Case, now overruled, would achieve simplicity and uniformity, and give better rights to daughters, though it would fail to equalize the position of the widow with that of the son. It is in conformity with the real intention of the legislature, though not with the specific language of the section. Conversely, the view in Rangu Bai's Case does justice to the position of the widow and her position is made equal to that of a son, but the position of a daughter suffers; it introduces considerable complexity in law and was not within the contemplation of the legislature.[36] The weakness in Rangu Bai's Case

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36. Derrett, Adoption Succession, and the Present State of Hindu Law, 68 BOM.L.R.(J) 41, 45.

reveals itself when applied to the facts of Sidrappa's Case, that is to say, the mother of the deceased inherits a large portion of the property of the deceased thereby diminishing the shares of the widow, daughters, if any, and collaterals like the brothers. In short, it does violence to the general principle found in most legal systems that in the scheme of succession children and a spouse are entitled to be preferred over an ascendant like the mother. The view of the Mysore High Court attempts to adjust equitably the shares among the female heirs inter se but in order to accomplish this it invokes Explanation II to section 6 for a purpose not envisaged by the legislature. For, Explanation II refers to the disability of a person "who has separated himself from the coparcenary before the death of the deceased" to claim any share on intestacy. A female member like the mother, while a member of the joint family, is not a member of the coparcenary. Also this view eliminates the mother from class I heirs and equates her rights with a right of partition. These judicial flounderings reveal the impossible task thrust on the courts by the legislature by an ill-considered drafting of the section.

C. SECTION 8 OF THE HINDU SUCCESSION ACT

Section 8 of the Hindu Succession Act is of general applicability as it applies to the devolution of the coparcenary interest under the Mitakshara law (section 6), to the devolution of an interest in a

tarwad, tavazhi or illom where the deceased is governed by the Marumakattayam law (section 7) and to persons governed by the Dayabhaga law as well as to the separate properties under the Mitakshara law. Thus, it embodies the basic policy in respect of intestate succession as formulated by the legislature.

Section 8 states[37] that the property of a male Hindu dying intestate shall devolve :

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;[38]

(b) secondly, if there is no heir of class I, then upon the heirs, being relatives specified in class II of the Schedule;[39]

(c) thirdly, upon agnates, and

(d) lastly, upon cognates of the deceased.

Of these categories of heirs, those in class I of the Schedule constitute the most important category and most successions will be distributable among them.

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37. The Hindu Succession Act, 1956 sec. 8.

38. The heirs in class I of the Schedule are: Son; daughter; widow; mother and son of a pre-deceased son; daughter of pre-deceases son; son of a pre-deceased daughter; daughter of pre-deceased daughter; widow of a pre-deceased son; son of a pre-deceased son of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of a pre-deceased son of a pre-deceased son.

39. I. Father. II. (1) Son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister. III. (1) Daughter's son's son, (2) daughter's son's daughter, (3) daughter's daughter's son, (4) daughter's daughter's daughter. IV. (1) Brother's son, (2) sister's son, (3) brother's daughter, (4) sister's daughter. V. Father's father; father's mother. VI. Father's widow; brother's widow. VII. Father's brother; father's sister. VIII. Mother's father; mother's mother. IX. Mother's brother; mother's sister.

1. Simultaneous Heirship

A salient feature of succession among class I heirs is the adoption of the principle of "simultaneous heirship" — a feature one encounters in the Muslim law of succession. The principle of simultaneous heirship in section 8 avoids the fixation of specific fractions as successional portions in favour of a spouse or other heirs, as for example under the Statute of Distribution in England.

The adoption of this principle gives rise to the question; who should be admitted as simultaneous heirs? In particular, the present enumeration of class I heirs includes widow of a pre-deceased son and widow of a pre-deceased son of a pre-deceased son.

a. Mother

Under the Hindu Succession Act mother ranks as a class I heir while father is a class II heir; whereas in the Quranic law both parents are entitled to inherit.[40] At the outset this gives rise to a policy consideration, especially in modern times, whether one or both parents should be allowed to share along with the descendants and the spouse. Denying such rights of parents Bentham advances two reasons :

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40. See p. 23 infra.

first, superiority of affection, that we love those better who depend upon us than those whom we depend upon; second, superiority of need, that our children cannot exist without us whereas our parents may exist without us.[41]

The first reason advanced by Bentham is too subjective and incapable of verification to justify a conclusion based on it. On the superiority of need, the following observation of Wilson has considerable force : "The Muslim doctors might retort here that the children may, as likely as not, be in the prime of life, and the parents decrepit --".[42] In India, as yet, there are no social security schemes that deserve mention to provide for the aged as in many countries in the West, and this obligation must continue to rest with the family institutions. Therefore, the allotment of shares, as such, is not open to any objection. However, under the Hindu Succession Act while the mother is a class I heir, the father ranks as a class II heir. It is submitted that as between the parents, there is no reason to give an inferior position to the father. It is also submitted that both parents should jointly be entitled to one share as class I heirs.

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41. BENTHAM , THEORY OF LEGISLATION 180 (4th ed. Hildreth 1882).

42. WILSON, ANGLO-MUHAMMADAN LAW 63 n.1 (6th Ali ed. 1930).

Under the Hindu Succession Act whenever a mother succeeds or in the Muslim law when parents succed, they take an absolute interest in property and not a limited interest. This causes hardship to the children of the original holder of property. For example, if a Hindu died leaving a widow, son, daughter and mother, and his self-acquired estate is worth 400,000 rupees the mother's interest will be 100,000 rupees. On her death subsequently, the share inherited by her will be inherited by all her children (and their descendants by the right of representation) and the children of the first deceased will get only a fraction of their father's estate which was inherited by their grandmother. As women belonging to older generations did not, generally speaking, engage in professions, the argument that they will be getting the benefit of other properties owned by her will not be true in a large number of cases. Though the hardship mentioned above exists equally in case of male heirs like sons, still relatively the hardship will be more in case of female heirs. Especially, in cases of premature death of the husband, the primary responsibility of maintaining and educating children and of performing the marriages of daughters falls on the widow, and therefore, the conferment of absolute rights runs counter to the well-established principle enunciated by Bentham that in a law of intestacy descendants should be preferred to ascendants.[43]

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43. BENTHAM, THEORY OF LEGISLATION 180 (4th ed. Hildreth 1882).

Therefore, it is suggested that under the Hindu Succession Act, the mother should be entitled to a life interest only when she inherits the properties of her deceased son along with his widow and children.[44]

Under the existing Mitakshara law the inclusion of mother as a primary heir may result in a concentration of property in her hands. For, if her sons die as infants, she will inherit the coparcenary interest of her sons by virtue of the operation of section 6 of the Act.[45] In view of the high rate of infant mortality in India, the problem is of some magnitude and calls for an amendment to the Hindu Succession Act. Of course, if the proposal to abrogate the right by birth is adopted, this problem will not arise.

b. Widow of a pre-deceased son and widow of a pre-deceased son of a pre-deceased son

In communities where the remarriage of widows is common, even though the Act provides that these widows should not have remarried at the time when succession reopens,[46] the provision in their favour will

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44. Similarly we suggest that under the Muslim law parents should be given a life interest. See p. 27 infra.

45. TEWARY, PRINCIPLES AND PRACTICE OF HINDU LAW 103 (1962).

46. The Hindu Succession Act, 1956, sec. 24.

cause resentment. The problematic aspect of this question is best expressed in the following observations of the Rau Committee :[47]

> We may here confess that we have found great difficulty in deciding who should be admitted as "simultaneous heirs" of a male Hindu dying intestate. . . . In favour of excluding the widowed daughter-in-law (and a fortiori the widowed grand daughter-in-law) the following arguments have been adduced: (i) She is not an heir in most systems of inheritance. (ii) . . . . (iii) The daughter-in-law, even if a widow, will inherit to her father (assuming that the daughter is made a "simultaneous heir"), and it is unnecessary to make her an heir to her husband's father as well. On the contrary, it has been strongly urged, (i) that if her husband had survived his father, he would have taken his share in the father's property which would then have devolved on her as his widow, that it is a mere accident that her husband did not survive his father and that her position should not be worsened on this account; (ii) that Viswarupa gives her an equal place with the intestate's own widow, and that as regards other legal systems, the Parsis now recognize her as an heir; (iii) that the extension of the provisions of the 1937 legislation to agricultural land in many of the provinces shows that provincial opinion is also now in her favour; and (iv) that what the Central and many Provincial Legislatures have deliberately chosen to give her should not be taken away by us.

The retention of the widowed daughter-in-law can be justified at least for some period of time, on the grounds that (1) among the widows belonging to the upper castes, remarriage is still uncommon and (2) that generally, a widow with children is less likely to remarry. But the retention of a grand daughter-in-law among class I heirs is not

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47. REPORT OF THE HINDU LAW COMMITTEE sec. 73, 19 (1955 Reprint).

convincing to the same extent. Usually she will be young enough to remarry and to take to a career. She is an heir by affinity and when descendants like daughter's grandchildren are not among class I heirs it is unreasonable to include her among class I heirs. It is submitted that a widow of a pre-deceased son of a pre-deceased son should be removed from class I heirs. Any special cases of hardship can be rectified by resort to testamentary disposition.

2. Class II Heirs

Among the class II heirs the father is mentioned in the first entry. As between the parents, it is submitted logically there is no reason to give an inferior position to the father. It is suggested that both the parents should jointly be entitled to one share as class I heirs but their interest should extend only to a life interest.

The second entry of class II heirs enumerates (1) son's daughter's son, (2) son's daughter's daughter, (3) brother and (4) sister as heirs. The third entry mentiones (1) daughter's son's son, (2) daughter's son's daughter, (3) daughter's daughter's son and (4) daughter's daughter's daughter.

The entries in class II of the Schedule give rise to two questions : (1) Whether collateral succession should be permitted and

(2) If so, whether descendants like a daughter's son's son should be postponed to the brother and sister of the deceased.

Advocating the abolition of collateral succession Mill states:[48]

> [I]n regard to collateral relatives, it is not unless on grounds personal to the particular individual, the duty of any one to make a pecuniary provision for them. No one expects it, unless there happen to be no direct heirs; nor would it be expected even then, if the expectations were not created by the provisions of law in case of intestacy. I see, therefore, no reason why collateral inheritance should exist at all. Mr. Bentham long ago proposed, and other high authorities have agreed in the opinion, that if there were no heirs either in the descending or in the ascending line, the property in case of intestacy should escheat to the State. . . . Few will maintain that there is any reason why the accumulations of some childless miser should on his death (as every now and then happen) go to enrich a distant relative who never saw him, who perhaps never knew himself to be related to him until there was something to be gained by it. But the reason of the case applies alike to all collaterals, even in the nearest degree.

Therefore, collateral succession is open to weighty objections but as expectations in relation to collateral succession were being created from centuries, it needs be confined to brothers, sisters and their children only.

It may be pointed out that collateral succession among class II heirs extends only to brothers and sisters and their children. The

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48. MILL, PRINCIPLES OF POLITICAL ECONOMY 219 (Robson ed. 1965).

rights of collaterals should be confined only to those heirs. Further, the rights of collaterals should be postponed to those of descendants.

D. AVAILABLE MECHANISMS TO DEFEAT WOMEN'S RIGHTS OF INHERITANCE

Today the basis of succession is no longer hinged to the right of an individual to dispose of his property as he likes, and the rules of succession are not considered as representing, as nearly as possible, the probable intentions of an intestate. To an increasing extent, they are regarded as embodying the social obligations of a deceased person towards the members of his family. The prevailing restrictions on testation in many legal systems and the legislations in England like the Inheritance (Family Provision) Act, 1938,[49] and the Intestates' Estates Act, 1952,[50] serve to illustrate the changed outlooks on intestate succession. Thus a consideration of the available mechanisms to circumvent the rules of inheritance gives an indication as to the extent to which the policies inherent in the rules of intestacy can be defeated.

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49. 1 & 2 Geo. 6, c. 45.

50. 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64.

One of the serious omissions under the Hindu Succession Act is the absence of any provisions invalidating devices intended to defeat or reduce the rights of female heirs. On the contrary by conferring unrestrained testamentary power, the legislature has facilitated the circumvention of even the limited rights of inheritance conferred on female Hindus. This mode of disinheritance is available in respect of all Hindus, whether they are governed by the Mitakshara, Dayabhaga or Marumakattayam laws. In addition, under the Mitakshara law two other modes deserve special mention, namely, (1) by renouncing one's interest in the coparcenary properties and (2) by throwing self-acquisitions into the joint family properties. By the former, the rights of inheritance of female heirs can be totally defeated, and by the latter, they are curtailed.

1. Renunication of Interest in Coparcenary

A perusal of the parliamentary debates indicates that the legislature overlooked the implications of renunciation of interest in coparcenary while enacting section 6 of the Hindu Succession Act. No specific formality is required for the relinquishment of the interest beyond the expression of a clear intention to that effect. On such renunciation, the releasor is deemed to have separated from the joint family. But this does not affect the joint status of other members of

the coparcenary. As pointed out by the Privy Council in Alluri Venkatapathi Raju v. Dantuluri Venkatanarasimha Raju,[51] :

> His renunciation merely extingushes his interest in the estate, but does not affect the status of the remaining members quoad the family property, and they continue to be his coparceners as before.

A renunciation can effectively defeat the rights of succession of female heirs mentioned in class I of the Schedule. The considerable hardship that may result by this lacuna in the Act is noticed in a learned note.[52] Thus, renunciation is an effective mode of defeating the rights of female heirs, especially of daughters.

Similarly, it is also open to a father to make a partition of joint family property during his lifetime without reserving any share for himself. This method is likely to be resorted to in the states of Madras, Andhra and Mysore (except in certain localities), where the practice of alloting shares to female members at a partition does not exist. The legislature should, therefore, remedy the defect by providing that a father is not entitled to renounce his interest in joint family as to defeat the rights of female members.

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51. /1937/ Mad. 1, 7. (P.C.).

52. Kohli, Exclusion of Separated Person under Section 6 of the Hindu Succession Act, 1956, 9 J.I.L.I. 93 (1967).

2. Conversion of Self-acquired Property into Coparcenary Property

Self-acquired property will devolve equally upon class I heirs; however, self-acquisitions can be converted to joint family properties with great facility. A Hindu governed by the Mitakshara law, by an expression of an intention to that effect and without any formal act on his part can convert his self-acquired properties into joint family properties.[53]

In Subramania v. Commissioner of Income-Tax,[54] the Madras High Court observed :

> The assessee and his son undoubtedly constitute members of a joint Hindu family. They might have started with no ancestral nucleus or other joint family property, but there was nothing to prevent the assessee from impressing upon any self-acquired property belonging to him the character of joint family property. No formalities are necessary in order to bring this about and the only question is one of intention on the part of the owner of separate property to abandon his separate rights and invest it with the character of joint family property.

Moreover, the transformation of self-acquisitions into joint family properties is frequently effected to reduce the burden of income tax.[55] By blending the self-acquisitions and effecting a

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53. Venkata Reddi v. Lakshmana A.I.R. 1963 S.C. 1601.

54. A.I.R. 1955 Mad. 623, 624.

55. Stremann v. Income-Tax Commissioner, A.I.R. 1962 Mad. 26; Income-Tax Commissioner v. Keshav Lal, A.I.R. 1965 S.C. 866.

partition, an assessee can accomplish two results : first, a reduced tax incidence, as the income of the property is distributed among the coparceners and, secondly, he would be making a settlement of his properties, even though of a limited character, among his sons during his lifetime. Neither the blending of assets nor the subsequent partition can be termed transfer of assets direct or indirect to invite the application of section 64 (iv) of the Income Tax Act.[56]

3. Self-acquired Properties Devolving on a Son under a Gift or Will

An important question is : Whether the properties acquired under a will or gift of the father, will be treated as separate or ancestral properties in the hands of the donee or legatee? If they are ancestral his (donee's or legatee's) sons will acquire the right by birth; whereas if they are considered as separate properties they will devolve equally on intestacy.

On this point formerly the High Courts in India differed in their views but it is now authoritatively settled by the Supreme Court

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56. The Indian Income-Tax Act, 1961, sec. 64 (iv). Section 64 says: "In computing the total income of any individual, there shall be included all such income as arises directly or indirectly --- (i) [omitted], (ii) [omitted], (iii) [omitted], (iv) Subject to the provisions of clause (i) of section 27, to a minor child, not being a married daughter of such individual, from assets transferred directly or indirectly to the minor child by such individual otherwise than for adequate consideration. . . .

in Arunchala Mudaliar v. Muruganatha Mudaliar.[57] There the substantial question was whether the properties the defendant got under the will of his father were to be regarded as ancestral or self-acquired properties in his hands. If ancestral, his (defendant's) sons would acquire a right by birth in them. The Supreme Court pointed out that the father is quite competent to provide expressly when making the gift that the donee would take it exclusively for himself or that the gift would be for the benefit of his branch of the family. In the absence of clear words, the Supreme Court pointed out that the intention should be gathered from the surrounding circumstances. Mukherjea, J.,[58] stated :

> The material question which the court would have to decide in such cases is, whether taking the document and all the relevant facts into consideration, it could be said that the donor intended to confer a bounty upon his son exclusively for his benefit and capable of being dealt with by him at his pleasure or that the apparent gift was an integral part of a scheme for partition.

Such a right conferred on the donor to burden the property with the incidents of ancestral property either expressly or impliedly is open to two objections. First, it will be restricting the free

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57. A.I.R. 1953 S.C. 495.

58. Id. at 500.

alienability of property. Second, the recognition of such a right will mean the denial of equal rights of intestate succession among the children of the donee. If the donor intended to a confer a specific bounty in favour of his son's sons he should be free to do so expressly. But in the absence of such express creation of interests, it is submitted, law should not recognize the conversion of separate property into ancestral property.

Indeed, what is contended here is more fundamental : That the law should declare that in any event properties which are originally self-acquisitions of an ancestor should not be treated as ancestral in the hands of his descendants. In other words, the rule should be "once a self-acquisition always a self-acquisition". Such a legal provision is essential as the complete abolition of the effects of right by birth will take a couple of generations.

E. NEED TO EVOLVE RESTRICTIONS ON THE CONVERSION OF SEPARATE PROPERTY INTO ANCESTRAL PROPERTY

To be sure, the abolition of right by birth and the conversion of a Mitakshara into a Dayabhaga coparcenary, will necessarily take two or three generations to complete. This is inherent in the very nature of the right. The right as noted before exists in favour of

sons, son's sons, and son's son's sons. Further, the partition can be effected by means of a unilateral declaration. Therefore, so soon it is known that a bill is being introduced in legislature to abolish the right by birth, the right will be made a "fait accompli" by coparceners by means of unilateral declarations. Further, it is open to a father to partition the properties provided he gives his sons equal shares with himself. "The right of a father to sever the sons inter se is a part of the patria potestas still recognized by the Hindu law."[59] In practical terms, therefore, the complete elimination of the effects of right by birth, will take at least two generations.

The draft Hindu Code of the Rau Committee provided that the right by birth would not be recognised in property devolving after the commencement of the Code;[60] whereas the draft of the Select Committee on the Hindu Code states "no right [by birth] . . . shall be recognised in any Court".[61] The second draft purported to take away the existing rights also. This, though seemingly more satisfactory, may be open to

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59. MULLA, supra note 17, sec. 323.

60. REPORT OF THE HINDU LAW COMMITTEE 61 (1955, reprint).

61. The Hindu Code Bill, 1948 (as amended by the Select Committee), See also the dissenting minute by Tek Chand and Balkrishana Sharma, Report of the Select Committee on the Hindu Code, p. 8.

the objection that vested rights are being taken away and therefore its constitutionality is likely to be impugned. Further in the Punjab the sons cannot ask for separation of properties during the lifetime of the father. A grandson in Bombay cannot ask for partition unless his father consents to it, whereas in other states governed by the Mitakshara law they are entitled to ask for partition. In view of these regional differences such a measure will have unequal effect and will cause hardship on people in some regions more than others. Again, the constitutional validity of such a measure may be open to doubt. The only practicable measure was to enact a provision to the following effect :[62]

> Except in the cases and to the extent provided in this Part, no Hindu shall, after the commencement of this Code, acquire any right to, or interest in -
>
> (a) any property of an ancestor during his lifetime merely by reason of the fact that he is born in the family of the ancestor, or
>
> (b) any joint family property which is founded on the rule of survivorship.

As mentioned before, the complete assimilation of the Mitakshara and the Dayabhaga coparcenaries, will be a slow process. The process can be intensified by rendering separate properties

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62. Amendment proposed by the Government to cl. 86 of the Draft Hindu Code as amended by the Select Committee.

non-convertible in to ancestral properties. If it is enacted that separate and self-acquired properties of an individual can in no event be construed as ancestral properties the amount of properties which are ancestral in character will be narrowed. The effects of the measure will be uniform throughout India. A reduction in the categories of coparcenary property will achieve a smooth transition in the abolition of Mitakshara coparcenary. Therefore, it should be enacted that separate and self-acquired properties of an individual can in no event be construed as ancestral properties in the hands of his descendants.

F. PROTECTION OF THE RIGHTS OF INHERITANCE

Till now the problems relating to giving of equal rights of succession to women have been considered. But it is equally important to consider the means by which these rights can be protected. For, if the equal rights conferred on them can be defeated easily, what will be achieved is equality in form and not in substance. The Hindu Succession Act while giving rights of inheritance to female heirs, also conferred a testamentary power to disinherit them. Section 30 of the Act[63] lays down :

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63. The Hindu Succession Act, 1956, sec. 30. As to the extent of the operation of this section there is considerable divergence in the opinions of the writers, but this is not material for our present consideration.

> Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.
>
> Explanation: The interest of a male Hindu in a Mitakshara coparcenary or the interest of a tarwad, tavazhi, illom, or kavaru shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this sub-section.

The protection against disinheritance is not a problem which pertains to female heirs exclusively, but seems likely to be of more importance to them. As stated by Seth Govind Das [64]:

> Then again another thing will happen. The Honourable Dr. Ambedkar wants that the daughters should also be given the right of succession to the property. Then I would submit that in our society which is undivided at present [sic], when the fathers execute the will, they will not bequeath anything to their daughters, but would give to the sons alone, and thus this would defeat the very object with which you want to confer the right of succession on the women.

In general the laws in India with the exception of the Muslim law, have not evolved restriction on testation. Therefore, disinheritance by execution of a will, can be availed of by all Hindus under the Hindu Succession Act whether they are governed by the Mitakshara, Dayabhaga

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64. Constituent Assembly of India Debates (Legislative) 865, dated 24th Feb. 1949 (official translation).

or the Marumakattayam law. The reason for absence of any restraint on testation is that at the time when the English concept of will was taking its root in India, the trend at common law was to remove fetters on freedom of testation. But since then there has been a change in the outlook. It is worthwhile to recall the observation of the learned editor of Jarman in this context [65] :

> "The art of will-making", according to Hazlitt," chiefly consists in baffling the importunity of expectation." Whether or not this be too cynical a view, the protection of the rights of the family as an essential unit in society is a primary concern of most systems of law. Complete freedom of testation, as enjoyed under English law for a brief period of forty-seven years, is therefore, by the standards of comparative jurisprudence an anomaly.

During the debates on the Hindu Succession Bill the fear was voiced that the rights of female heirs will be defeated be executing wills. Brushing aside these fears the Minister for law, Honourable Pataskar, said [66] :

> I beleive that a normal father will never do any such thing and if at all he has to do it for any reason, he will surely make a provision for his daughter when he is going to deprive her of her share by will.

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65. JARMAN ON WILLS 73 (8th ed. Jennings 1951).

66. [1955] 5 Lok Sabha Debates, col. 8379.

It is submitted that the above statement is an over-simplification of a serious problem. The postponement of a consideration of imposing restraints on testation may be justified as the Government was anxious to proceed with the essential feature of the Bill, namely, to remove the disability of females to inherit; and that the imposition of restraints involves the accomplishment of a satisfactory balance between an individual's right of disposition and the protection of the members of his family, which is a task of considerable difficulty in any legal system. However, to ignore the existence of the problem is not justified.

The above statement of the Minister for Law is questionable on the following grounds: First, advanced legal systems like that of France, Germany, Switzerland and even the U.S.S.R. thought it necessary to restrain testamentary freedom. Even in England, the Inheritance (Family Provision) Act, 1938,[68] and the Intestates' Estates Act, 1952 envisages restrictions on testation. Second, in a country where the

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67. 1 & 2 Geo. 6, c. 45.

68. 15 & 16, Geo. 6 & 1 Eliz. 2 c. 64.

practice of sati (widow burning herself to death on the funeral pyre of her husband) prevailed until 1829, where in certain parts female infanticide used to be common, it is illogical to say that persons nurtured in traditional attitudes would hesitate to disinherit the daughters. These attitudes derive considerable support even now by the importance attached to the existence of a son in the Scriptures. Third, there is a considerable demand even now to repeal the Hindu Succession Act, especially with respect to agricultural properties in the states of Haryana and the Punjab. In fact these state governments have even contemplated bringing out a measure to satisfy this demand.[69] Fourth, the necessity for strict enforcement of the social obligations of an individual towards the members of his family, both individually and collectively, is greater in the Indian context as there are : (a) no social security measures, (b) no measures to provide for aged and infirm people, and (c) limited opportunities for women to engage in professions. To recall a point made by Shrimati Renuka Ray during the Debates on the Hindu Code Bill :[70]

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69. Women resent move to amend Hindu Law, The Indian Express (Delhi) Sept., 16, 1969, p. 3, col. 5. It says: "Women's organizations in the Capital have decided to launch a nationwide wave of protest meetings against the Punjab Government's proposal to amend the Hindu Succession Act, depriving Hindu women of the State of their limited right of inheritance".

70. Constituent Assembly of India Debates (Legislative) 928, dated 25th Feb. 1949.

> Those women or men who are social workers know that an analysis of the inmates of rescue homes in this country will go to prove how many of these women are those who have been turned out of the joint family. Without having the training to earn their own living, turned out of their homes these women have been forced to live a life of shame.

Fifth, an indefeasible share will elevate the status of women. As pointed out[71] : "ownership of property will make women independent and they will undoubtedly gain in status. Besides, this will effectively check the feeling that women are a burden to the family".

These and other reasons suggest that protection against disinheritance is of considerable importance. One made of protection is to confer the right by birth on daughters also. Startling though the proposition may appear, it was in fact suggested; under the Marumakattayam law a similar right exists in the tarwad properties.[72] However, as submitted earlier, the right by birth even in case of the sons is unsuited to a progressive society and anachronistic in its working. The introduction of right by birth in the Dayabhaga law will create more problems that it seeks to solve. Further, the protection extended by it

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71. Written statement submitted to the Hindu Law Committee 178 (1945).

72. The suggestion to make the daughter also a full coparcener was made by Dr. Bakshi Tek Chand during the debates on the Hindu Code Bill. Vide Constituent Assembly of India Debates (Legislative) 594-95, dated 14th Dec. 1949.

As to the rights of female members of a tarwad under the Marumakattyam Law, see MAYNE, HINDU LAW AND USAGE (11th Aiyar ed. 1953) and Mary v. Bhasura Devi, 1967 KERALA L.T. 430 (F.B.).

will not be available in the case of widow or mother. Therefore, any solution based on a further extension of right by birth should be rejected. Thus we are led to a search for protective devices in Western legal systems. For this purpose two legal systems are examined. First is the legislation in New York which is a common law system. The second is the Civil Code of Quebec where civil law prevails in a general setting of common law.

CONCLUSIONS

(1) The special rules for devolution of agricultural tenancies should be abolished as they remove an important segment of properties from the beneficial effects of the Hindu Succession Act.

(2) Renunciation of an interest in joint family properties which will prejudice the rights of female heirs should be prohibited.

(3) In addition to the abolition of right by birth, to accelerate the pace of equality in status of women, it should be enacted that separate property can in no event be construed as joint in the hands of descendants. Such a measure will eliminate

the possibility of reducing the rights of inheritance of female heirs by the conversion of separate into joint family properties.

(4) The legislature should impose restraints on testation, as otherwise the rights of inheritance conferred under the Hindu Succession Act will be nullified by making wills.

CHAPTER THREE

TRENDS IN THE WEST : A STUDY OF THE LAWS OF NEW YORK AND QUEBEC

We have considered in the previous chapter the need to protect the share of female heirs under the Hindu Succession Act. In this chapter the experience of the West in relation to women's rights of inheritance, the legislative devices to protect against disinheritance, and their suitability for the Indian conditions, will be noticed with special reference to the laws of New York and Quebec.

A. RELEVANCE OF WESTERN EXPERIENCE

1. General

At the outset a question may be asked : Is the Western experience relevant at all ? The Western experience is relevant at least in two respects. First, eversince 1850, in India there has been a migration of common law replacing the indigenous Hindu, Muslim and customary laws in all spheres except the personal laws relating to family. The Indian Constitution not only incorporated the concepts of equality and fundamental freedoms, as in the Western Constitutions, but also used those Constitutions as models in the actual drafting. After independence, the Hindu law which was relatively untouched, witnessed some radical changes such as a legal provision for divorce and judicial separation, which were

unknown to the Shastric Hindu law. Secondly, under the impact of Westernization and industrialization social conditions similar to those in the West are being generated. One such example is the breakdown of the old family structure and the emergence of new family patterns which have not yet been crystalized. Thus, the social context of the laws in the West can also throw considerable light.

However, this does not mean that Western institutions can be blindly adopted. Their suitability to Indian social conditions will have to be judged. In other words, the problem is one of adaptation and not of importation.

2. Basic Features of the Western Legal Systems

The laws of inheritance in the Western legal systems in general, and that of New York and Quebec in particular reveal some basic common features. First, when dealing with rights of inheritance among children no distinction is drawn on the basis of sex. Article 625 of the Civil Code of Quebec says :[1]

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1 . Civil Code, Art. 625.

> In all cases children or their descendants, succeed without distinction of sex or primogeniture, and whether they are the issue of the same or of different marriages. In all cases, they inherit in equal portions and by heads when they are all in the same degree and in their own right. . . .

The New York Law of Descent and Distribution states [2] :

> The property of a decedent not disposed of by will ... shall be distributed as follows :
>
> (a) If a decedent is survived by :
>
> (1) A spouse and children or their issue, money or intangible personal property not exceeding in value two thousand dollars and one-third of the residue to the spouse, and the balance thereof to the children or to their issue per stirpes.

The second feature is that the surviving spouse takes a definite fraction of the estate of the deceased. Article 624b [3] says :

> If the deceased leaves a consort capable of inheriting, and issue, the surviving consort takes one-third and the child or children take the other two-thirds. . . .

The New York law introduces a further refinement in the share given to the widow. The New York law provides that if a decedent is survived by : [4]

> A spouse and only one child, or a spouse and only the issue of one deceased child, money or intangible personal property not exceeding in value two thousand dollars and one-half of the residue to the spouse, and the balance thereof to the child or to his issue per stirpes.

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2. Art. 4.1.1(a)(1) of the Estates, Powers and Trusts Law, L. 1966, ch. 952, effective from Ist September, 1967 (hereinafter referred to as EPTL).

3. Civil Code, Art. 624b.

4. Art. 4-1.1(a)(2) of EPTL.

Thus, in the Western legal systems there is a distribution of the estate among the spouse and children. Referring to the sociological effects of the shift in the laws of inheritance away from primogeniture in the United States, Tappan says[5] : "All this led to a democratization of the family and society." Further, he points out[6] : "The principle of equitable distribution of estates to descendants has played some considerable part in an inclination of our families to keep their size small enough to insure a fair patrimony to each." Both these effects are desirable to an utmost degree in India today.

The third feature common to New York and Quebec legal systems is that protection of the right of inheritance is afforded only in the case of the surviving spouse. In New York this is achieved by providing to the surviving spouse an election to take against a will. In Quebec the protection to the surviving spouse is achieved under the community of property.

In the American continent, the protective devices like dower, community and the modern elective share seek to protect the property rights of the widow. On the other hand the legitime

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5. TAPPAN, The Sociology of Inheritance, in SOCIAL MEANING OF LEGAL CONCEPTS 66 (1948).

6. Id. at 67.

affords protection to all heirs other than the widow. The general trend in the Western world to afford protection to the widow only is explainable on sociological factors. The children, when they come of age, leave the parental home and migrate to other places in search of employment. However, even in the United States, the restriction of the protection to the spouse alone is regarded as unsatisfactory. Tappan observes :[7]

> Considering the extent of preoccupation which the contemporary society displays for its children and youth, the law of succession appears to lag badly in several important respects in relation to their welfare. Any child may be defeated in his normal expectations by a parent's will : he has no right of forced share in the estate.

3. Appropriateness of the Basic Features to India

To what degree are these basic features noted above appropriate in the Indian context ?

Equitable distribution of the estate among the heirs is conceded in theory and to an extent in practice in the Hindu Succession Act. We have noted, for example, that separate property devolves on class I heirs as "simultaneous" heirs. The only question for consideration, therefore, is what is an equitable distribution in India.

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7. TAPPAN, supra note 5, at 71-72.

The above question brings to a sharp focus the second basic feature of the New York and Quebec laws viz., that the widow takes a specific share, say one-third as against other heirs. Under the Hindu Succession Act, the principle of simultaneous heirship was followed. In the West a widow gets a fixed share, irrespective of the number of other heirs like sons and daughters,[8] whereas under the Hindu Succession Act she gets a share depending upon the number of other heirs which may for our purposes be described as a "distributive share".

The existing distributive share under the Hindu Succession Act is desirable and does not need alteration. First, unlike in the West where, generally speaking, the contribution of the spouse to the accumulations of the deceased, either directly or indirectly, is large and the contribution of the children is usually negligible (as they leave the homes to have their independent careers), in India the contribution of the wife for the accumulation of wealth is minimal. On the other hand, sons usually assist in the business of the father or in the agricultural operations. In many families the sons who have independent careers usually aid the family by shouldering the burden of education of their brothers and sisters. As yet no claim has been voiced that the distributive share adopted in the Hindu Succession Act resulted in hardship.

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8. With the exception of the case in New York where if the deceased left a widow and one child, she gets money or intangible personal property not exceeding two thousand dollars and one-half of the residue.

Under the distributive share if there are numerous children, the share of the widow stands reduced. If on the other hand the children are less in number, the share of the widow in the estate of her husband increases correspondingly. If there is a correlation between the size of the share and the family planning, the existing distributive share should tend to limit the size of the family, a consideration of great importance in India.

The third basic feature noted above relates to the trend in the West to protect the inheritance right of the widow in the estate of her husband. Dower, marital community and elective share, are generally aimed at protecting the share of the widow only. It has been pointed out that this position is not regarded as satisfactory even in the United States and protection of the intestate share of the children, at any rate of infant children, is considered to be necessary. The Fourth Report of the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates in New York states [9]:

> In contrast with the solicitude for the welfare of children of a neglectful testator revealed in the legitime of those jurisdictions following the civil law and in the maintenance programs of England and the Commonwealth nations, the continued complete freedom of the New York testator to disinherit his dependent children appears to reflect an indifference to moral and social irresponsibility and is certainly out of harmony with the vast social legislation which has characterized the last half century in this State and Country.

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9. FOURTH REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, State of New York Legislative Document No. 19, 1965, 197-98 (hereinafter referred to as the Fourth Report).

> As to the urgency for specific legislation to prevent the disinheritance of dependent children in New York, statistics will probably never be available. Yet the high rate of divorce and remarriage in this State, as elsewhere in the country, resulting in the fact that testators frequently leave children of more than one marriage, makes the likelihood that certain dependent children will be inadequately provided for, if not actually neglected, at least as great if not greater than in those countries presently having either forced heirship or family maintenance laws. Some program for the protection of dependent children would therefore seem to be in order.

It has been pointed out before that there is a great likelihood that the Hindu Succession Act, 1956, will lead to a tendency to disinherit daughters. There is an additional reason as to why the intestate shares of children should be protected. India is at present witnessing the transformation of a traditional society to a new society based on new values of equality and dignity of the individual. The older generation clings to the traditional views on caste, arranged marriages, etc., and expects obedience to the wishes of parents. The younger generation exhibits a tendency to break these barriers like caste. Parents thus aggrieved at the conduct of their children may disinherit them, or the children fearing the deprivation of the inheritance may yield to the pressure of the parents in matters like marriage. Thus, an unrestricted right to disinherit children may inhibit the progressive trends in the society. Therefore, to facilitate the democratization of family and society, protection should be given to the whole family group against disinheritance.

B. THE ELECTIVE SHARE IN NEW YORK

1. Introduction

The New York Decedent Estate Law is of special relevance for our purposes because the legislation in New York was initiated after careful consideration and is subject to constant examination and revision. The law of New York can throw useful light on the following aspects : (1) What is the legislative technique adopted for protecting the share of the widow ? (2) How was balance between the competing policies, namely, freedom of testation and protection of the share of the surviving spouse achieved ? (3) By what means was the protective device sought to be evaded ? and (4) What were the remedial measures adopted to overcome the evasion of the provisions ?

2. General Background

In 1927 in an attempt to simplify and modernize the administration of decedents' estates in New York, a commission was appointed under the chairmanship of Surrogate Foley. The Commission condemned dower as obsolete and useless as a protective device and harmful to real estate transactions. It pointed out "the glaring inconsistency" in the New York law which compelled a man to support his wife during his lifetime and permitted him to leave her penniless

at death.[10] It advocated the adoption of legislation similar to that passed in Pennsylvania which gave a right to the widow to take her intestate share against the provisions of the will.[11] The recommendations of the Foley Commission were carried into effect by legislation in 1929. Franklin D. Roosevelt, the then Governor of New York, hailed it as "a new charter of women's rights".

The importance of the New York legislative technique can be realized from the following statistics.[12] At present thirty-three states other than New York provide for a right of election in varying forms. Eight states provide for community property. Of these community property systems, Lousiana and California confine the right of election to separate property. In another eight non-community states, the surviving widow is protected by means of dower. The right to take against the will of the spouse, brings the law of the states providing for election closer to the continental systems.[13]

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10. THE REPORT OF THE COMMISSION TO INVESTIGATE DEFECTS IN THE LAW OF THE ESTATES 86, Legislative Document No. 69 (1930) (hereinafter cited as the Foley Commission Report).

11. Id. at 87.

12. These figures are cited in STATE OF NEW YORK, THIRD REPORT OF THE TEMPORARY COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, 206, Legislative Document No. 19 (1964) (hereinafter referred as the Third Report and the subsequent reports in that order).

13. Current Legislation, 28 COLUM. L. REV. 1088, 1093 (1928).

3. The Technique of Inflexible Restraints

In adopting the elective share approach New York preferred a statutory determination as to the quantum that should be taken by a widow even as against the will of her husband, rather than leaving the determination of this question to the courts. The share given to her is not based on the establishment of need.[14] The adoption of the elective share principle by the Model Probate Code[15] and also under the revised draft[16] confirms this trend in the United States.

4. Flexible Restraints

However, when dealing with the question of protection of children against capricious disinheritance the Fourth Report[17] preferred the legislation on the model of family maintenance statutes.[18] It states:

> Since forced heirship bears no direct relationship to need and would in many instances interfere seriously with thoughtful estate planning, the introduction into New York law of the legitime would not seem advisable. There would, on the other hand, appear to be no serious obstacle to the introduction of a maintenance program similar to that which exists today in England and the Commonwealth countries. The two difficulties which immediately come to mind are that such

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14. MACDONALD, FRAUD ON THE WIDOW'S SHARE 271 (1960).

15. Model Probate Code, Secs. 31 to 33.

16. First Tentative Draft of Revised Part II Model Probate Code secs. 215, 222. See 41 N.Y.L.REV. 1037, 1058 (1966).

17. Fourth Report, supra note 9, at 199.

18. Id. at 198.

> a legislative plan would give to the suprogate too great a power to interfere with the testamentary disposition of the testator and that it would result in a significant increase in the amount of litigation. These, however, seem not in fact to have proven to be substantial problems in those countries where such programs have been in effect.

In countries like Australia, New Zealand, Canada and England, the family maintenance statutes provide maintenance to the needy dependents of the deceased out of the estate. Maintenance is determined by the court on an application made to it by the dependent. In England the Inheritance (Family Provision) Act, 1938,[19] conferred a discretionary power on the courts to award maintenance to dependents and this power was extended to intestate estates.[20] Even in the United States there is a considerable body of scholarly opinion which is of the view that legislation on the lines of family provision is more suited to the United States.[21] Especially Macdonald in his scholarly work says that forced heirship solutions fail to take into account the needs of a claimant and that they do not make allowance for the complicated relationships resulting from remarriage. He suggests a statute based on the model of family maintenance statutes in the British Commonwealth. His model Act provides for judicial control over all inter vivos transfers made within a particular period.[22]

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19. Inheritance (Family Provision) Act, 1938, 1 & 2 Geo. 6.c. 45.

20. Intestates' Estates Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2 c. 64.

21. Laufer, Flexible Restraints on Testamentary Freedom -- A Report On Decedents' Family Maintenance Legislation, 69 HARV.L.REV. 277 (1955); MACDONALD, FRAUD ON THE WIDOW'S SHARE (1960).

22. MACDONALD, FRAUD ON THE WIDOW'S SHARE 299-327 (1960).

5. Arguments against Maintenance Legislations

On what grounds did New York law reject the maintenance legislation as a protective device in the case of surviving spouse ? The Third Report[23] rejecting the suggestion of Macdonald observed :

> Such legislation would require that the share of the surviving spouse, if any, would be determined by the judge to whom the application was made. That this would promote litigation in most estates of married decedents, where the surviving spouse has not received the entire assets of the decedent or has not acquiesced in the provisions made by the decedent is evident. Aside from the burden that this would place upon the courts, the wisdom of allowing the courts to dispose of the decedent's assets as the particular judge deems just, rather than allowing the decedent to dispose of his property as he sees fit, is open to serious objections. . . . [I]t is submitted that at least in so far as the faithful surviving spouse is concerned, a minimal statutory share will not only protect him or her, but will avoid the expense and inconvenience of court proceedings to obtain maintenance from an estate which he or she probably had a hand in accumulating.

Further they add: "Finally, maintenance legislation is essentially and designedly flexible and uncertain and would inherently breed litigation"[24].

As pointed out earlier the Commission, on the other hand, preferred maintenance legislation in the case of children. It is significant that in England where family maintenance legislation is in operation a leaning towards a fixed share is noticeable in the writings

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23. Third Report, supra note 12, at 211.

24. Ibid.

of the jurists. Guest, in a learned article, points out a number of defects which render the family provision Act less capable of achieving the protection of the family.[25] Of these the following deserve particular mention : (1) the powerlessness of the court to intervene, unless the provision made or omitted was unreasonable; (2) the reluctance of judges to entertain applications, if the estates are small; and (3) the necessity to go into the whole history of marriage to support or rebut the application. "The whole history of the marriage has to be raked over, past squabbles resurrected, acts of unkindness, unfaithfulness and violence recalled in order to provide material to support or rebut the application".[26] In conclusion the learned writer says :[27]

> It is further suggested that those foreign systems which ensure that a certain proportion of the inheritance is kept within the family dispose of many of the injustices which may arise and accord better with the present social attitude towards property.

Yardley after pointing out the inherent weaknesses of family provision legislation arrives at a similar conclusion.[28] He says :

> As will be readily appreciated, there may well be many wives or other relatives who, for reasons of pride or family feelings, are unwilling to make an application to the court, and it seems that the law is, consequently, in danger of failing the very people it has so

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25. Guest, Family Provision and the Legitima Portio, 73 L.Q.Rev. 74 (1957).

26. Id. at 87.

27. Ibid.

28. YARDLEY, THE FUTURE OF THE LAW 141 (1964).

> conscientiously set out to assist. Accordingly, . . . it is suggested that it may well be worthwhile in the future investigating the possibility of providing automatic and fixed rights for those persons who at present have the right to apply to the court for family provision after the death of a deceased.

From the above it is clear that even in the common law jurisdictions in the West, whether at practical or theoretical levels, the preference for family protection by means of Family Maintenance Acts is, to say the least, not decisive.

6. Evaluation of the Legislative Technique in India

The question for consideration is : As between the forced share and maintenance solutions, which is more suited to the Indian conditions ? The reasons mentioned in the Third Report[29] for the rejection of a maintenance legislation to protect the share of a widow are equally applicable in India, not only in the case of a widow but also in the case of other female heirs like daughters. A solution based on the maintenance principle causes hardship to aged, infirm people, and women living in villages, as the courts are located in towns. It will throw considerable burden on the courts already taxed with heavy arrears in cases. Further, legislation on the lines of family provision statutes is unnecessary and infructuous in view of

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29. Supra note 12, at 211.

section 22(2) of the Hindu Adoptions and Maintenance Act which says :[30]

> Where a dependant has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependant shall be entitled, subject to the provisions of this Act, to maintenance from those who take the estate.

Further, we envisage protection as a device to prevent disinheritance of daughters arising out of irrational prejudices and to alleviate the status of women. A married daughter who is being supported by her husband cannot take advantage of a maintenance provision.

Finally, there is the problem of enforcement of maintenance rights. In India, legal aid to the poor does not exist in many parts and where it is available, is not working satisfactorily. Therefore, a disinherited female heir may not have the means to pursue litigation. And even where she has the means, because of notions of family pride and self-respect, a female heir is more likely not to enforce the right available under a maintenance provision.

At this stage it is worthwhile to recapitulate that the Fourth Report rejected the forced share solution to provide for children.[31] The reasons for the rejection have been stated thus :

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30. The Hindu Adoptions and Maintenance Act, 1956, sec. 22 (2). The dependants mentioned in sec. 21 among the others include the following : Mother, widow, unmarried daughter of a predeceased son and widowed daughter.

31. Fourth Report, supra note 9, at 198.

> Since forced heirship bears no direct relationship to need and would in many instances interfere seriously with thoughtful estate planning, the introduction into New York law of the legitime would not seem advisable. There would, on the other hand, appear to be no serious obstacle to the introduction of a maintenance program similar to that which exists today in England and the Commonwealth countries.

In India estate planning is unknown. Therefore, even in the case of children the forced share concept is more suited.

From the foregoing, the conclusion emerges that as a legislative technique the forced share principle is more suited to India. This leads to a consideration of the nature of the elective share, its suitability to India, the problems of evasion experienced in New York and the nature of remedies adopted to overcome them.

7. Nature of Elective share in New York

The elective share in New York and in other American jurisdictions is only one form of the forced share principle followed in civil law jurisdictions. The other two forms are : (1) removing a portion of the deceased's estate from the operation of the provisions of the will and allowing it to devolve according to the rules of intestacy and (2) granting a portion of the intestate share to heirs indefeasibly.

Originally, section 18 of the Decedent Estate law[32] gave to the surviving spouse a personal right of election against a will, to take a share of the estate of the deceased "as in intestacy".[33] One unusual feature of the New York law should be noted : Where the elective share of the surviving spouse did not exceed twenty-five hundred dollars (now ten thousand) the surviving spouse was given the right to take her intestate share outright, in lieu of any provision for her benefit in the will. However, if the intestate share exceeded twenty-five hundred dollars, and the testator provided that the income of an amount

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32. Decedent Estate Law, section 18, (hereinafter cited as D.E.L.). Section 18 was amended seven times between 1930 to 1965. The provisions of the Decedent Estate Law have been consolidated and reenacted in the Estates, Powers and Trusts Law, L. 1966, ch. 952, effective from Ist September, 1967.

33. To avoid the confusion created by the words "share as in intestacy" used originally in the statute, the surviving spouse's share is now termed as "elective share". See the note given to L. 1966, ch. 517.

The intestate share was one-third of the net estate if the decedent is survived by one ormmore than one child and in all other cases one-half of the estate. Impliedly this provision accepts one-half of the estate as standard for the freedom of testation; Garland, The "Non-Barrable" Share: Some Comments Regarding A Reappraisal, 32 ST. JOHN'S L. REV. 218, 223 (1958). In computing the net estate debts, administration expenses and estate taxed were deducted. To these deductions, Funeral expenses were added as a deduction in 1933 and estate taxes were eliminated in 1955.

34. D.E.L. sec. 18 (1) (c), now EPTL 5-1.1 (a) (C).

equal to or greater than the intestate share should be payable to the surviving spouse for life, the surviving spouse could elect to take the sum of twenty-five hundred dollars outright but, the terms of the will were otherwise effective.[35] In short, the surviving spouse was entitled to an outright gift of the intestate share up to twenty-five hundred dollars and the income for life on the balance of the intestate share,[36] if an appropriate provision is made in the will.

The right of election was designedly made personal and it could not be exercised by the executor or administrator of the surviving spouse. The elective right was and is intended to protect the spouse from being left penniless. No such purpose would be served, if the right was exercised by the legal representatives of the deceased. Secondly, where there were children by a first wife, to confer the right of election on the legal representatives would amount to providing a windfall to the children of a surviving spouse at the expense of the children of the spouse who died first.

If an election was made, the will was valid as to the residue remaining after the deduction of the elective share and the terms of the will were effective as far as possible.[37] An election under the

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35. D.E.L. sec. 18 (1) (b).

36. D.E.L. secs. 18 (1) (b) - (e).

37. D.E.L. sec. 18 (2); EPTL 5-1.1(a)(1) (E).

provisions had to be made within six months from the date of issuance of the letters testamentary or of administration.[38]

It is open to the husband or wife, during the lifetime of the other to waive or release the right of election to take against a particular last will, or as against any last will of the spouse.[39] Such waiver is required to be made or proved in the manner prescribed for the conveyance of real property.[40] A waiver can be executed either before or after the marriage.[41] It may be either absolute or conditional, and with or without consideration.[42]

8. An Appraisal

The non-barrable share in New York has two significant features. First, the protection is afforded only to the widow.[43] As pointed out before, in India the protective device should not be confined to the widow only, but should also include the children and parents. The New York provisions which protect a surviving spouse's right are not capable of extension to cover the whole of the family group including

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38. D.E.L. sec. 18 (7); now EPTL 5-1.1(e) (1).

39. D.E.L. sec. 18 (9); now EPTL 5-1.1(f) (1).

40. D.E.L. sec. 18 (9); now EPTL 5-1.1(f) (2).

41. D.E.L. sec. 18 (9) (a); now EPTL 5-1.1(f) (3) (A).

42. D.E.L. sec. 18 (9) (d) & (e); now EPTL 5-1.1(f) (3) (D) & (E).

43. The right of election is given to the surviving spouse and in respect of that right the term widow should be understood as meaning surviving spouse.

children and parents because according to the New York law the protected heir will be entitled to take his or her share "as in intestacy". If this principle is adopted to protect children, as well as the widow it will eliminate testamentary power in most cases. From this the conclusion emerges that the reservation of a part of the estate is a preferable alternative. The second dominant characteristic of the elective share is that it can be waived. The provisions providing for a waiver of elective share give rise to difficult considerations of policy in India. Should an agreement, made either before or after the marriage, waiving the right of compulsory portion or non-barrable share be permitted ? Where marriage settlements are common and separation agreements between enstranged spouses are frequent, the right of waiver can be justified. But in India marriage settlements are rarely entered into and separation agreements are very uncommon. To permit a waiver of a compulsory portion will leave the door open to evasion as it may often be resorted to by agreements executed before marriage and thereby defeating the policy behind the statute. Prima facie a waiver of the right of election is justified in separation agreements, but even then there may be cases in which it would be appropriate to give a right of election to the spouse. And if a separated wife is entitled to inherit the property of her husband on intestacy, as is the case under Indian law, no objection can be envisaged to giving a non-barrable share to a

surviving separated spouse. Secondly, waiver is in its nature an irrevocable act. The party waiving the right might have misjudged the turn of events or the probable estimate of the fortunes. Though a conditional waiver can to a certain extent mitigate the hardships of unforeseen events in the act of waiver, still it will be expecting too much from the skill of a draftsman to provide for all contingencies. Therefore, it is submitted that in India a waiver of the compulsory portion should not be permitted.

The third question is as to the quantum of the estate on which the will can be allowed to operate. We have seen that in adopting the principle that a surviving spouse can elect to take her intestate share, the maximum share given in New York to a surviving spouse is half the estate. Under the Hindu Succession Act also this proportion should be maintained. To put it differently, the disposable portion should be half the estate of the deceased.

9. Problems of Evasion under the New York law

a. General

Even though the specific solution adopted in New York is unsuited to Indian conditions, an examination of the modes utilized for evading the protection is instructive. Such a study will reveal how any forced share device, whether it conforms to the New York pattern or not, may be defeated and what are the remedial measures needed to overcome

the difficulties. Further, as pointed out by the Third Report[44] "The same devices used to defeat the right of election may be used with equal impunity where the decedent dies intestate". These features in the New York legislation will now be considered, viz., (1) the techniques adopted for evasion of the forced share in New York (2) how they were overcome by legislation and (3) if in the Indian context a forced share can be defeated similarly and, if so, what are the legislative measures necessary to overcome the evasion.

b. Modes of Evasion

Among the devices adopted in New York to evade the statutory protection given to a surviving spouse, the following deserve special mention : (1) inter vivos trusts (2) Creation of joint interests (3) life insurance and (4) gifts and transfers for inadequate consideration.

i. Inter vivos Trusts

A surviving wife could be disinherited by reducing the value of the estate to zero by making inter vivos transfers. Any attempt to control the evasion of the statutory protection by restricting the

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44. Third Report, supra note 12, at 186.

inter vivos transfers gives rise to a policy question : to what extent should restraints on alienation be permitted ?

Whether, as between the competing policies of protection to the surviving spouse and free alienation, one is entitled to priority over the other was left open by the New York legislature. At first, the courts were inclined to support the concept of family protection. Thus, in Le Strange v. Le Strange[45] the husband created trusts whereunder he retained an interest for life and after his life the properties were to be divided equally among his children through a former marriage. On an application made by the wife, the court set aside the trusts even during the lifetime of the husband. Again in Bodner v. Feit[46] the deceased transferred three months prior to his death a substantial part of his property to his four children by a prior marriage. His widow brought an action to set aside these transfers as they were intended to defeat and defraud her statutory rights under the Decedent Estate Law. The court held that the transfers were invalid. Townley, J. observed :[47]

> Under the statute, husbands and wives have the utmost freedom of control over their respective properties and may transfer them as they will in normal course during their lives. They may not, however, strip themselves of their property for the sole purpose of depriving those that the statute intended to protect of their right to inherit.

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45. 242 App. Div. 74, 273 N.Y. Supp. 21 (2nd Dept. 1934).

46. 247 App. Div. 119, 286 N.Y. Supp. 814 (Ist Dept. 1936).

47. 286 N.Y. Supp. 814, 817.

Untermyer, J. in his dissent stated :[48]

> I am able to find no warrant in the Decedent Estate Law for an action of this character . . . It [section 18] places no restriction on the right of disposition over property during the lifetime of either party to the marriage. The only limitation is upon the power of testamentary disposition.

The fear of great obstruction of the free alienability of property, expressed in the dissenting opinion, is counteracted by the fact that a transfer will be valid if made for a valid consideration and if the grantor reserved no benefit for himself.[49]

The doubt cast by the dissenting judgment received further impetus in Newman v. Dore,[50] a decision of the New York Court of Appeals. In that case the decedent executed three days before his death trusts for the purpose of evading sections 18 and 83 of the Decedent Estate Law. The settlor reserved the enjoyment of the entire income for life and the right to revoke the trust at his will. The powers of the trustees were made subject to the settlor's control during his lifetime. The widow challenged the validity of the trusts.

The court proceeded on the premise that if the statute, in express language or by clear implication, prohibits the transfer, it

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48. 286 N.Y. Supp. 814, 820.

49. 50 HARV.L.REV. 529, 530 (1937).

50. 275 N.Y. 371, 9 N.E. 2d 966 (1937), 112 A.L.R. 643 (1937).

is illegal; if the laws of the State do not prohibit it, the transfer is legal. Further, it was of the view that "defeat of a contingent expectant interest by means available under the law cannot be regarded as an unlawful 'evasion' of the law".[51] Adverting to the question, how far the statute protects the right even while it remains expectant or contingent, Lehman, J. observed[52]:

> Since the law gives the wife only an expectant interest in the property of her husband which becomes part of his estate, and since the law does not restrict transfers of property by the husband during his life, it would seem that the only sound test of the validity of a challenged transfer is whether it is real or illusory.

It was held that judged by substance and not the form, the conveyance was illusory and the trust was invalidated in its entirety.

In Krause v. Krause[53] the testator during his lifetime conveyed real property to his sons by a former marriage reserving a life interest for himself. He also opened an account in a savings bank as a trustee for his daughter. The widow brought an action to set aside these conveyances of realty and personality. The Court of Appeals upheld the validity of the transfers stating[54]:

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51. 9 N.E. 2d 966, 967.

52. Id. at 968-69.

53. 285 N.Y. 27, 32 N.E. 2d 779 C.A. (1941).

54. 32 N.E. 2d 779, 780.

> The transaction evidenced by either of these deeds was a real transaction in that thereby Gustav Krause divested himself of a major legal estate or interest in real property in accordance with the essential forms of law. . . . We cannot find in section 18 of the Decedent Estate Law any suggestion that such a conveyance by a husband or wife was ever to be defeated by the other spouse merely on the score of its having been voluntary.

As to the savings bank account the court came to the conclusion "that the depositor intended to create a trust but intended to reserve power during his lifetime to deal with the deposit in any way he should choose".[55] This was held to be illusory.

Finally, In re Halpern[56] recognized the immunity of Totten Trusts[57] (savings bank trusts) against the right of election. There the deceased named his wife as the sole executrix and beneficiary under his will. Fifteen months before his death he opened four savings accounts in trust for his granddaughter. The widow claimed that the amounts under the trust accounts should be turned over to her as they were illusory and

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55. Id. at 781. The quoted words are from 1 SCOTT ON TRUSTS, 358.

56. 303 N.Y. 33, 100 N.E. 2d 120 (1951).

57. The nature of a bank account trust was described in Matter of Totten, 179 N.Y. 112, 125-26, 71 N.E. 748, 752, 70 L.R.A. 711 (1940) thus :

> A deposit by one person of his own money in his own name as a trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as the delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.

and violated sections 18 and 83 of the Decedent Estate Law. The Court of Appeals rejecting the claim of the widow observed : "There is nothing illusory about a Totten trust as such . . . It is the simple fact that section 18 does not affect the disposition of property inter-vivos".[58] Rejecting the soundness of the lower court's view that these trusts could be invalidated to the extent necessary to give effect to the widow's statutory share the court stated : "We see no power in the courts to divide up such a Totten trust and call part of it illusory and the other part good."[59]

Though sections 18 and 83 of the Decedent Estate Law were intended to benefit the surviving spouse, the courts set aside illusory trusts entirely.[60] In the language of the Third Report : "The effect of this is that distributees other than the surviving spouse receive a windfall."[61]

ii. Joint accounts

Evasion of the elective share of a surviving spouse by means of joint accounts opened in real and fictitious names was also resorted

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58. 100 N.E. 2d 120, 123.

59. Id. at 123.

60. If the entire trust was invalidated, intestacy operated giving benefit to other heirs alongwith the spouse.

61. Third Report, supra note 12, at 189.

to in New York. Under the New York law a joint account can validly be opened in a fictitious name along with a real name. In Inda v. India[62] the deceased Albert Inda opened joint accounts in the names of Victoria J. Inda and Andrew P. Inda respectively along with a fictious name. The widow individually and as an administratrix brought an action to recover to the estate the amount in the two bank accounts. It was held that the widow was not entitled to recover the amount as a valid joint account had been created under the Banking Law. Finch, J. stated that the actual intent of the intestate makes no difference as held in Newman v. Dore.[63]

iii. Insurance

In the United States a person is entitled to name anyone as the beneficiary under his insurance policies and, normally to change the deisgnation at any time. In Mitchell v. Mitchell[64] the deceased while he was estranged from his wife changed the beneficiary – designation under his insurance policies in favour of his mother. The value of the policies amounted to 50,000 dollars. After reconciliation he told his wife that he had not changed the beneficiaries under the policies. The

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62. 288 N.Y. 315, 43 N.E. 2d 59 (1942) C.A.

63. Supra note 50.

64. 290 N.Y. 779, 50 N.E. 2d 106 (1943) C.A.

widow brought an action to set aside the change of beneficiary under the policies. The Court of Appeals per curium affirmed the decision of the Appellate Division to dismiss the complaint. Macdonald reviewing the New York cases on this branch says : "On the whole, then, we may say that the courts appear to take it for granted that life insurance is immune to the widow's attack".[65]

However, the extent to which the mechanism of insurance policies is adopted to defeat the rights of widows should not be exaggerated. Plager points out :[66]

> The available data clearly suggest that to the extent life insurance is used as a will substitute by a married person, either to create an estate where none exists or to supplement an existing estate, the surviving spouse -- whether husband or wife -- is the object of favor and, in the case of the wife, is probably favored to the virtual exclusion of all others.

The experience of New York under the 1930 statute shows that a forced share will not be effective unless the powers to make inter vivos transfers are controlled. The greatest difficulty revolves around the question what kinds of transfers should be voidable at the option of the spouse. At first the courts in New York used the test

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65. MACDONALD, supra note 14, at 238.

66. Plager, The Spouse's Nonbarrable Share : A Solution in Search of a Problem, 33 U. Chi. L. Rev. 681, 697 (1966). (Footnotes omitted).

of "intent to defeat" the widow's share. In Newman v. Dore,[67] the court rejected the motive or intent test but sustained the widow's challenge on the ground that the transfer was illusory. However, the court did not make it clear as to what would constitute an illusory transfer. In the Halpern Case[68] the court refused to invalidate the transfer in which the deceased parted with no economic benefit. Reservation of the power of revocation, reservation of the administrative control or of the life interest did not affect the validity of the trust.

But viewed differently, the conflict between the freedom of alienation and the unbarrable share, as conceived by the courts in New York, is unreal. For, the concept of freedom of alienation was evolved to protect commerce, and it cannot be said that this object will be defeated, if only one type of alienation, namely, voluntary alienations are restricted in the interests of family. The analogy of restraint on testation inherent in the legislation ought to have suggested to the courts that gifts could also be subjected to similar restraints. A remedy against voluntary transfers will not operate as a restraint on commerce, unless recourse is made available against

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67. Supra note 63.

68. Supra note 56.

bona fide purchasers for value.[69]

iv. Proposals for Reform

To overcome the evasion of the elective share of a surviving spouse several proposals were made. After considering these suggestions to cure the defects of the New York law,[70] the Third Report concluded thus :[71]

> It is obvious that the statute to be drawn involves many questions of policy which can ultimately be determined only by the Legislature.
>
> It is submitted that to protect freedom of alienation of property every outright and absolute transaction should be immune from the attack of the surviving spouse even if it is gratuitous. Also protected would be any transaction "made for full consideration in money or money's worth". Nor would "transfers in contemplation of death" be covered.
> . . .
>
> It is proposed that the right of the surviving spouse to attack inter vivos transfers be restricted to the following :
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> (a) gifts causa mortis,
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> (b) Totten trusts,
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> (c) joint accounts,
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> (d) joint tenancies,

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69. Although there are potential problems in protecting a purchaser for value even with notice, it worked satisfactorily in Federal Estate Tax.

70. Third Report, supra note 12, at 130-38.

71. Third Report, supra note 12, at 138-39.

> (e) any transfer or conveyance made by the decedent in trust or otherwise to the extent that the decedent at the date of his death retained alone or in conjunction with another, a power to revoke such transfer or conveyance, or a power to consume, invade or dispose of the principal thereof.

Pursuant to the above recommendation, Art. 5-1.1(b) clause (A), (B), (C), (D) and (E) were enacted declaring that the above types of dispositions should be treated as testamentary substitutes for the purpose of election by the surviving spouse in case of persons dying after August thirty-first, nineteen hundred sixty-six.[72] But it should be noted that the New York legislation does not invalidate testamentary transfers in which a life estate is reserved in favour of the donor even if made with an intent to defeat the right of election.

10. Devices to Evade a Forced-share and Their Effectiveness under Indian Law

The questions for consideration now are : To what extent will the devices adopted in New York to evade the elective share be effective in India ? If effective, what remedial measures should be adopted ? In New York it has been noted, that the legislation was enacted to check evasion by certain kinds of inter vivos transfers: joint accounts, Totten trusts and transfers and trusts made with a power of revocation vested in the transferor.

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72. EPTL. 5-1.1(b) cls. (A), (B), (C), (D), and (E).

a. Inter vivos transfers

The kinds of inter vivos transfers that can defeat a forced share have been noticed earlier. Of these gifts in good faith pose an important problem of policy, viz., the extent to which the freedom of an individual may be curtailed, and will be considered later.[73] A forced share can be defeated under the Indian law by an outright transfer or by means of testamentary transfers, that is, conveyances made retaining a life interest in favour of the donor. Though these are strictly inter vivos transfers, their close similarity with devises in practice renders it necessary to check evasion by a resort to them. As to sham transfers, the existing provision under section 84 of the Indian Trusts Act is sufficient to cover these cases. Section 84 states :[74]

> Where the owner of property transfers it to another for an illegal purpose . . . or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor.

Two clarifications are necessary in the existing law of trusts to remove any ambiguity : (1) that any transfer made with an intent to defeat the compulsory portion of heirs is illegal and

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73. See p.177 infra.

74. The Indian Trusts Act, 1882, sec. 84.

(ii) the words "or his legal representative" should be added at the end of section 84 of the Indian Trusts Act. It may be pointed out that under the Act the rights of bona fide purchasers without notice are protected.

It is submitted that the following provision suggested by Cahn[75] should be incorporated under Indian law :

> Except for the rights of bona fide purchasers for value, transfers made (a) subject to enjoyment or control of the decedent or (b) with an intent to diminish or defeat the rights of his dependents should be judicially voidable.

Though the intent test was rejected by the Third Report,[76] it should be preferred under the Indian law. The "intent test" enables the courts to check all possible types of devices adopted to defeat the statutory protection.

b. Joint Accounts and Joint Transfers

A purchase in the name of a wife or child under English law gives rise to a presumption of gift. But in India no such presumption arises because of the practice of "benami transactions". The practice of purchasing property in the name of others is widespread in India

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75. Cahn, Restraints on Disinheritance, 85 U.PENN.L.REV. 139, 143 (1936).

76. Third Report, supra note 12, at 131.

and such transactions are known as benami transactions. Such benami purchasers are entirely different from a trust relationship. "The cardinal distinction between a trustee as known to English law and a benamidar lies in the fact that a trustee is the legal owner of property standing in his name and the cestui que trust is only a beneficial owner, whereas in the case of a benami transaction, the real owner has got the legal title though the property is in the name of the benamidar."[77] When the transaction is made out to be a benami transfer, the benamidar's name (the person in whose name property stands) becomes simply an alias for that of a person beneficially interested.

The leading Indian case which exemplifies the position with respect to joint account is Guran Ditta v. Ram Ditta.[78] In that case one Teku Ram, a Hindu, deposited with the Alliance Bank of Simla a hundred thousand rupees which was his self-acquired property. The deposit was in the joint names of himself and his wife Gujri and was payable to either or the survivor. After the death of Teku Ram his wife withdrew the amount through her youngest son Guran Ditta. Ram Ditta the eldest son filed a suit for the recovery of his share, Rupees 37,368/-, on the

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77. Pitchayya v. Rattamma, 55 M.L.J. 856 (1928).

78. 55 I.A. 235 (1928).

ground that the amount belonged to the estate of Teku Ram. The question for consideration was whether the sum deposited became the sole property of Gujri by gift. The Privy Council held that the English doctrine of presumption of advancement is not applicable in India. The following passage in a previous decision rendered by it was cited with approval :[79]

> [T]hat owing to the widespread and persistent practice which prevails amongst the natives of India, whether Mohamedan or Hindu, for owners or property to make grants or transfers of it benami for no obvious reason or apparent purpose, without the slightest intention of vesting in the donee any beneficial interest in the property granted or transferred, as well as the usages which these natives have adopted and which have been protected by statute, no exception has ever been engrafted on the general law of India negativing the presumption of the resulting trust in favour the person providing the purchase-money, ... In such a case there is, under the general law in India, no presumption of an intended advancement as there is in England.

Thus, there being no presumption in favour of a gift, the only question that arises is whether transferor intended that the beneficial interest should pass to the transferee. It should be noted that a trust and gift of immovable property should be in writing and registered under Indian law and if the registration is not done a trust is not valid. A gift will be invalid if not registered within the statutory period.

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79. Kerwick v. Kerwick, 47 I.A. 275, 278 (1920).

c. Insurance Policies

The New York experience reveals that a nonbarrable share existing in favour of the widow could be defeated by designating someone other than the spouse as beneficiary of insurance policies. The New York legislation did nothing to rectify the evasion of the provision by this means. In view of the fact that among low-income and middle-income groups, the estate frequently consists of insurance only, if such a loophole in the protective share is left open, it may cause considerable hardship.

The problem does not arise in India as the nominee is not entitled to a beneficial interest in the amounts.

In Sarojini Amma v. Neelakanta[80] the deceased nominated his father under the life policy taken by him. The father of the deceased claimed that he alone was entitled to the amount and that the widow and son were not entitled to any share in it as heirs. The contention of the widow and son was that the intestate heirs alone were entitled to the amounts and that nomination did not confer any beneficial interest in ownership of the moneys. The court upheld this contention and stated :[81]

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80. A.I.R. 1961 Ke. 126 (FB.).

81. Id. at 127.

> A nomination by itself, as we understand it, confers no right on the nominee during the lifetime of the assured and only gives a bare right to collect the policy money on his death.

It was held that the amount should be divided among the intestate heirs, namely, the widow, son and the mother, equally under the provisions of the Hindu Succession Act, 1956. To this general principle some exceptions are recognized which are not material for our consideration here.[82]

The evasion of a forced share can be effectively checked by suitable modifications in law. By enacting a provision on the lines suggested by Cahn,[83] it is submitted, inter vivos transfers (other than gifts) as devices to defeat a forced share can be checked. Although the New York law rejected the intent test it is submitted that the Indian circumstances warrant a different approach.[84] Joint accounts and insurance policies as techniques to evade a forced share are ineffective under the Indian law. The regulation of gifts inter vivos give rise to substantial questions of policy and will be considered later.[85]

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82. The recognized exceptions are : (1) where the nomination amounts to a declaration of trust, (2) where the assured takes the policy as an agent of the nominee, (3) where the nomination is made under sec. 11 of the Married Women's Property Act, 1882, and (4) where the nomination is made under sec. 56 of the Friendly Societies Act, 1896. The third exception, it may be mentioned, actually protects the rights of the widow and children.

83. Supra note 75.

84. It may be pointed out that the Model Probate Code in sec. 33 (2) adopts the intent test.

85. See p.177 infra.

C. Community Property in Quebec

1. Introduction

The community of property affords protection to a married woman in the civilian systems of the West. Although community of property is almost wholly unknown in India now, it deserves examination in its own right. Legal scholars generally agree that in ancient Hindu law community property existed between the husband and wife.[1] Derrett says :

> Undoubtedly a community of acquisitions existed in ancient times. The text of Apastamba, and the commentary thereon of a Southern jurist of about the 11th century and the text dampatyor madhyagam dhanam which is ascribed to a certain Datta . . . point out conclusively to a time when even the dharma sastra recognized this community of goods.[2]

The right of a widow to obtain maintenance from her husband's property in Hindu law is traced to this

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1. Derrett, The Legal Status of Women in India, A.I.R. 1956 Journal, 73, 80.

2. Adverting to absence of provisions relating to community of property in legal texts of later times, he adds : "One of the academic reasons which did most to abolish community from the specifically legal text-books of ancient times was the law relating to women's separate property". Ibid.

community which existed between the husband and wife in ancient times.[3] Also even in recent times we find a reference to the existence of a kind of community among the Syrian Christians in Travencore. "Where a husband and wife are married according to what is called the Kettlikeruka system, the husband acquires a community of interest in the wife's property, and neither the wife nor the husband can alienate or encumber the property without the consent of the other".[4]

The Quebec legal system reveals an uncommon, if not unique, feature, namely, the retention of both community property and dower for protection of the widow along with the freedom of testation.[5] Therefore, an examination of the community in Quebec will reveal whether it can successfully protect the rights of a widow without curtailing the rights of testamentary freedom in India. It may be asked : Is the adoption of a separate protective device in the case of a widow

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3. Muthalammal v. Veera Raghavalu Naidu, A.I.R. 1953 Mad. 202.

4. 14 M.L.J. 137, 144.

5. As to this remarkable development of testamentary freedom in Quebec, see Dainow, Unrestricted Testation in Quebec, 10 TU. L.REV. 401, 415 (1936).

justified ? We have noticed that in New York the intestate share of the wife is protected by right of election and maintenance legislation is recommended to protect the children from disinheritance. Further, if the deceased died leaving infant children the burden of maintaining and educating the children falls primarily on the widow. Thus, the adoption of two different principles of protection is justifiable, if found suited otherwise. The main aspects for consideration are : (1) What is the experience of Quebec in respect of community property ? and (2) Is it desirable to adopt community property in India in the light of the prevailing social conditions ?

2. Basic Features of Community Property in Quebec

a. Nature of the Right

A conspicuous feature of marital community is that it rests upon a partnership in which the properties of both partners are united into a single mass either upon the basis of a contract entered into before marriage by the parties, or

in the absence of a contract, by law. For this reason it may be appropriately questioned whether marital property can be considered as a right arising on succession. Two considerations suggest that it is akin to a right of succession. First, the dissolution of the marriage and the crystalization of the wife's rights take place on death or divorce. To the extent that rights take effect on the death of the spouse, it can be equated to a right of succession. Secondly, article 624c. of the Quebec Code confers a capacity on the wife to succeed to the property of the deceased husband provided she abandons her rights under the community property and dower, as well as other rights under the marriage contract and rights to the proceeds of insurance policies upon the life of the deceased consort. As the Code confers a right of election to a spouse between the right under the community and the right of succession, the former may be considered as a right of succession. In other words, the right of the spouse under a matrimonial regime may be regarded, in the language of

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6. C.C. art. 624c.

article 1276 of the Civil Code, as "a title equivalent to succession".[7]

b. Freedom of Matrimonial Regimes

One of the cardinal principles of matrimonial regimes in most legal systems is the freedom of contract. The reason given by Berlier for this principle was that "any limitation of the freedom might be an obstacle to marriage".[8] In Quebec article 1257 of the Civil Code lays down this principle. It states that all kinds of agreements may be lawfully made in marriage covenants.[9] The wide nature of this right is made subject to article 1258 which prohibits all covenants contrary to public order or good morals or those forbidden by law.[10] But this concept needs a fresh approach. The disadvantages of this principle are three-fold. In the succinct statements of the French Commission : (1) "Elle risque de mettre en échec l'application d'une régle légale jugée utile." (2) "Elle introduit une grande diversité dans les régimes

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7. See, COMTOIS, TRAITÉ THÉORIQUE ET PRATIQUE DE LA COMMUNAUTÉ DE BIENS 70 (1964).

8. 3 PLANIOL CIVIL LAW TREATISE sec. 795 (Lousiana Translation 1959).

9. C.C. art. 1257.

10. C.C. art. 1258.

adoptés" (3) "Elle oblige les futurs époux à passer un contrat de mariage".[11] The present trend in all legal systems is to protect the status, well-being and dignity of individual from contractual stipulations entered into on a footing of inequality and which are incompatible with the notion of equality.

A criticism advanced by a writer from a socialist country may now be cited.[12] Lasok says:

> In the East European systems of law the one statutory regime of matrimonial property is compulsory. The justification for this approach can be found in the dogmatic intervention of the doctrine which regards the community system as fitting the superior type offfamily which is, of course, the Socialist family. Corroboration of this contention, as must be, is to be found in the writing of Engels who once said that 'in a bourgeois family it is not love that binds the marriage but considerations of personal gain entrenched in the distorted idea of the community property. . . .'

Even if one considers the above criticism as far-fetched, and the introduction of a single statutory regime as undesirable, still there is something to be said in favor of restricting the freedom of marriage covenants to promote the broad social policy of equality of sexes. Some of the participants in the 1961 Seminar On the Status of Women in Family Law organized by the United Nations were of the view that it was preferable to provide for a single statutory regime.[13] Also, there was

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11. Travaux De La Commission De Reforms Du Code Civil 1948-49, 337-38 (hereinafter cited as Travaux).

12. Lasok, Matrimonial Property -- Polish Style, 16 INT'L & COMP.L.Q. 230, 234-35 (1967) (Footnotes omitted).

13. 1961 Seminar On the Status of Women in Family Law, ST/TAQ/HR/11, para 47 (1961).

a general agreement among the participants to the effect that no matrimonial regime should contain provisions incompatible with the principle of equality of rights between the husband and the wife.[14] Therefore, prima facie the principle of freedom of matrimonial regimes may operate as a restriction on the concept of equality.

c. Immutability of Matrimonial conventions

The second basic feature of matrimonial regimes is their immutability, once the contract is entered into. The justification for this principle is based on three types of considerations: first, interests of the spouse; secondly, the interests of the family especially of children; and thirdly, the interests of third parties.[15] The general principle is laid down in the Quebec Civil Code in article 1260 in respect of marriages where no marriage contract had been made and in article 1265 in cases where the parties entered into marriage covenants.[16]

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14. Id. at para 51.

15. Travaux supra, note 11, at 353.

16. Civil Code arts. 1260 and 1265. The exceptions to the rule are: (1) article 208 of the Civil Code and (2) the rule that permits the donors to give property to a married person stipulating that it will not fall into the community. The provision is good even if the parties are married under the universal community. See COMPTOIS, supra note 7, at 196-97.

The writers prior to the Code Napoleon offered two reasons for this principle. Dumoulin based the principle of immutability on the ground that donations between the spouses were not permitted, since otherwise the husband might acquire the personalty[17] inherited by the wife. Other writers attributed it to the special nature of marriage covenants.[18] Under the Code Napoleon, while the old rule was retained a new reason was given, that is, it was desirable to protect the interests of the third parties and the creditors. But weighty reasons had been advanced suggesting that the spouses should be given the freedom to alter the matrimonial covenants. The spouses might have misjudged their actual interests or the conditions effecting their properties or families might have changed to render it desirable to change the matrimonial covenants.[19] Dagget advocates that law should permit parties to enter into marriage contracts during the marriage. It is hard to deny the force of the following observation :[20]

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17. The word personalty, though not a civilian term is adopted by writers. See PLANIOL, supra note 8, sec. 814 and SCHWARTZ, CODE NAPOLION AND THE COMMON-LAW WORLD 171 (1956).

18. 3 PLANIOL, supra note 8, at sec. 814.

19. The extreme lengths to which the parties had to resort to change the covenants are well illustrated in the facts of Lamarche v. Cardin, (1949) C.S. 384.

20. Daggett, Policy Questions on Marital Property Law in Louisiana, 14 LA.L.REV. 528, 545 (1954).

> Hard realities of life fortunately do not cloud the proper bliss of courtship, thus few contracts at all are made. If permitted later when time, thought and experience might dictate a need for rearrangement in the interest of the marriage, and with the present day participation by the wife in business, much good might be accomplished. It seems uniquely Victorian that the most interested of all parties may not contract with each other.

There is a definite trend in the continental laws to permit mutability of matrimonial covenants.[21] The German Civil Code permits modifications in matrimonial regimes by means of post-nuptial contracts.[22] Similarly article 179 of the Swiss Civil Code allows modifications in the matrimonial regimes.[23] It is significant that the French Civil Code now permits the mutability of matrimonial conventions under article 1397 according to the conditions specified under it.[24]

However, The Report of the Matrimonial Regimes Committee in Quebec rejected the change in the principle of immutability of matrimonial regimes.[25] The Report observes :

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21. For comparative studies of the problem, see Le Problème de la mutabilité du régime matrimonial in 7 DEUXIEME CONGRES INTERNATIONAL DE L' ASSOCIATION HENRI CAPITANT 301 et seq. (1952).

22. B.G.B. art. 1432.

23. Swiss Civil Code art. 179.

24. C.C.F. art. 1397. Para 1 of article 1397. The last para of the same article gives a right to creditors to enter opposition to such a judgment of the court as provided under the Civil Procedure Code.

25. REPORT OF THE MATRIMONIAL REGIMES COMMITTEE, CIVIL CODE REFORM COMMISSION 14 (1966) (hereinafter cited as The Quebec Report).

> In our law, the immutability of marriage covenants has always been an imperative rule directly connected to the principle of freedom of choice of the regime. . . . The draft introduces no changes on this point. Much has been put forward in favour of the possibility of mutability, subject to control and subjected to publicity, but it does not seem that such an innovation would be that useful. Moreover, its advisability appears doubtful if consideration is given to the technical difficulties to which it may give rise and the fradulent endeavors which it might render possible as much with respect to the treasury as to third parties.

d. Evaluation of Basic Features

The two basic features of the Quebec matrimonial regimes are unsuited to Indian conditions. The concept of protecting the rights of a spouse under a contract entered into by the parties before their marriage is unworkable in India. First, the vast majority of the people are illiterate and there is no institution comparable to the notarial system prevailing in the civil law countries to assist them in drawing up marriage contracts. Secondly, even among those who can have the benefit of legal counsel, arranged marriages are the rule rather than the exception in India, and there is a great anxiety on the part of parents to get their daughters married. Because of this huge sums are often offered as presents (referred to as dowry) to the bridegrooms. Viewed in this context, it will be clear that even where the marriage contracts are entered into, the bridegrooms would be in a position to impose stipulations in their favour. Therefore, neither of these basic features is likely to yield any good results in the present Indian society. The

conventional regime being unsuited to Indian legal system, the question arises whether a legal regime is suited to India.

3. Legal Community in Quebec

Even in civil law countries, most marriages are solemnized without the parties entering into a contract relating to the matrimonial regime. In all such cases, the legal regime, that is to say, the regime laid down by law governs the parties with respect to their marital properties. The salient features of the legal regime will now be considered.

a. Composition of the Community

Following the guidelines of the Code Napoleon, the Quebec Civil Code provides for the community of movables and acquests as the legal community. Article 1272 provides that the assets of the community consist [26] :

(1) Of all the moveable property which the consorts possess on the day when the marriage is solemnized, and also of all the moveable property which they acquire during marriage. This includes moveable property which falls to them by succession or by gift unless otherwise stipulated by the donor.

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26. C.C. art. 1272.

(2) Of all the fruits, revenues and interests received during marriage from property which belonged to the consorts at the time of marriage and from property which has accrued to them during marriage.

(3) Of all the immoveables they acquire during the marriage.

Two points need to be underscored in this context. First, it is open to a donor or a testator to prevent moveables from entering into the mass of the community by expressly stating that they are to go to the donee or devisee named; and secondly, of the property possessed at marriage only immoveables remain the private property of the spouses.

The moveables include obligations and actions in respect of moveables, as also the shares and interests in financial, commercial or manufacturing companies.[27]

In Scott v. Sun Life Assurance Company of Canada[28] it was held that a policy taken by the husband, living in community with his wife, and which was payable to the executors, administrators and assigns of the husband, belonged to the community. This was approved in Bernier - Fregean v. M.N.R.[29]. However, if a policy

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27. C.C. art. 387.

28. 38 R.de J. 18 (1932).

29. [1956] Ex. C.R. 421.

is taken under the special provisions of the Husbands and Parents Life Insurance Act,[30] the receipts of the policy will be excluded from the community.

b. Reserved Property

Apart from the separate property,[31] there is another species of property, namely, the "reserved property," the total administration of which is reserved for the wife. The reserved property will be in the community for purposes of partition.[32] Taking into account the changed social conditions, it was found necessary in France that earnings of a married woman should be under her control and in 1907 the law empowered a married woman to control and dispose of her earnings. The lead of France was followed by Quebec in 1931[33] and articles 1425a and f were inserted.[34] Article 1425a now provides :[35]

> On pain of the nullity of any covenant to the contrary, the proceeds of the personal work of the wife common as to property, the economies therefrom and the moveable or immoveable property she acquired by investing the same, are reserved to the administration of the wife and she has the enjoyment and free disposal of them.

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30. R.S.Q. 1964, c. 296, sec. 8 et seq.

31. See C.C. arts. 1275, 1278 & 1279a.

32. C.C. art. 1425f.

33. Act 21 Geo. V. c. 101.

34. C.C. arts. 1425a & f. Later the article was amended by S.Q. 1964, 12-13 Eliz. II, c. 66, sec. 22.

35. C.C. 1425a.

The English version uses the word "proceeds" which suggests that earnings should have actually accrued.[36] But in Plante v. Travers relying on the word "produit" used in the French version it was held that the wife's power extended even to income which was within reasonable anticipation.

c. Administration of Community

The legal status of a wife in community of property will be reflected in the powers enjoyed by a wife to administer the community. But in this respect the community of property systems are unsatisfactory as very wide powers of administration and management are vested in the husband in respect of the community and also in the separate property of the wife. Much ameliorative legislation was enacted in Quebec to rectify the position[37] but still the dilemma is inherent in the institution : Who should administer the community property ? The property has to be managed by someone and the usual answer of the Western systems is that the husband is that one.

Sometimes a joint control of community is suggested.[38] But in practice it poses many irksome problems. As Kahn-Freund pertinently

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36. [1940] B.R. 555.

37. S.Q. 1964, 12-13 Eliz. II, c. 66.

38. See Daggett, Is Joint Control of Community Property Possible ? 10 TU.L.Rev. 589 (1936).

asks [39] : "If the husband wants to speculate in oil shares and the wife in real estate, who is going to decide ?" Resolution of such conflicts by resort to the courts is open to serious objections. In addition, the joint administration of community gives rise to difficulties in legal transactions with third parties.[40]

The law of Quebec in considerable measure reveals the inequality of a married woman vis a vis her husband. This is implicit in the declaration of article 177 [41] : "A married woman has full legal capacity as to her civil rights, subject only to such restrictions as arise from her matrimonial regime." The husband alone administers the community.[42] He cannot sell, alienate or hypothecate without the concurrence of his wife any immoveable property of the community, but he can without such concurrence sell, alienate or pledge any moveable property other than business or household furniture in use by the family.[43] It is also to be noted that even for the sale, alienation or the hypothecation of the immoveable property of the wife, the consent

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39. Kahn-Freund, Matrimonial Property -- Some Recent Developments, 22 MODERN L. REV. 241, 243 (1959).

40. Massfeller, Matrimonial Property Law in Germany, in MATRIMONIAL PROPERTY LAW 369, 382 (Friedmann ed. 1955) (hereinafter cited as FRIEDMANN).

41. C.C. art. 177 as amended by 13 Eliz., c. 66.

42. C.C. art. 1292.

43. C.C. art. 1292.

of the husband is required; but she can sell, alienate or hypothecate her moveable property other than business or household furniture in use by the family without his consent.[44] The law is silent as to the legal consequences of such a sale effected without the consent of the husband. Although technically article 1297 confers a power on the wife to sell, alienate or hypothecate movable property other than business, the husband is entitled to obtain a withdrawal of such powers through a court on the ground of :[45] (1) refusal to account to the husband on demand for the revenue of her private property and (2) abuse of power of administration.

The only protection given to the wife from a jeopardy to the community assets is to obtain separation of property under article 1311 on the ground that :[46] (1) her interests are imperiled, (2) the disordered state of the husband's affairs gives reason to fear that his property will not be sufficient to satisfy her rights and reprises, (3) the husband has abandoned the family, and (4) for serious reasons it appears just and necessary that separation should be granted. But in practical terms it is to be doubted whether a wife, unless she is extremely cautious, will come to know about the mismanagement of her

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44. C.C. art. 1297.

45. C.C. art. 1298.

46. C.C. art. 1311.

husband's affairs until it is too late, and even if she is aware of the disordered state of her husband's affairs, whether, out of a natural concern to preserve the marriage, she would exercise her rights.

Thus a wife is under considerable disability under the community property system of Quebec. This is not peculiar to the Quebec system alone but a feature shared by all community systems in their original forms. It was suited to the conditions that prevailed in the 19th and the early 20th century but is out of step with the present trends and increasing economic role played by women. As pointed out by the British Royal Commission on Marriage and Divorce the community system is productive in inequality.[47] Rejecting the proposal for the introduction of community of property in England they observe :[48]

> We have, however, rejected community of property primarily because we think that the existing system of separate property is much better. In our opinion, community of property has three substantial defects. First, it takes no account of what we hold to be a natural and normal desire in people to acquire property of their own. . . . It is better to make separate property the rule; husband and wife are always free to own property together if they so wish.
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> Secondly, we are satisfied, from our examination of the systems of community of property in other countries, that a system of community of property would be extremely complicated and much more difficult to operate than a system of separate property, if it is to conform to the view of the wife's status which is accepted today. . . .

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47. ROYAL COMMISSION ON MARRIAGE AND DIVORCE (1951-1955) para 651 (Cmd. 9678).

48. Ibid.

> Thirdly, we think that the sum total of injustice under community of property would be far greater than under separate property. . . . It would often be most unfair that one spouse should be able to claim a half-share of property which the other spouse has acquired; we cite, as example, the case of a wife who has a lazy and improvident husband and who by her own hard work and thrift has managed to buy a house.

d. Evaluation

From the study of the composition and administration of the community property the conclusion emerges that in India it is unsuited even to the limited extent of accomplishing the protection of the interests of the widow. First, it implies the existence of three kinds of properties, viz., the common property, the separate property of the husband and the separate property of the wife. In the Indian context this will result in complexity in law, whereas the need is to simplify the laws. Secondly, in India now separation in property prevails. As noticed above the administration of community produces inequality and confers on the husband a dominant role in the administration of the common mass. This is undesirable because it will considerably reduce the existing rights possessed by married women to administer their properties. Thirdly, a perusal of the provisions relating to debts in Quebec will indicate that the law is complex and that the introduction of community property will necessitate many changes in the other branches of law such as insolvency, contracts etc. Neither the legislature nor the legal profession can be persuaded to accede to such

drastic changes in the law. Some of the above conclusions can be tested with reference to the existing position of separate property in Quebec and the views of the legal profession on the relative merits of community and separate property.

4. Separate Property in Quebec

a. General

In Quebec statistics reveal the popularity of separation of property among the spouses. Analysing the statistics of the notarial contracts for the year 1962 in the province of Quebec, Comptois observes : "Ce chiffre mis en regard du nombre total de mariages nous indique que 73% des mariages comporteraient le régime de la séparation de biens."[49] It is also a significant fact that according to this analysis the proportion of marriage contracts adopting separation of property increased from 43% in 1932 to 73% in 1962. Even in France the trend towards a preference for separation of property is noticeable. "Statistics show that about half of the marriage contracts made in the years between 1945 and 1949 adopted this régime, its popularity being rivaled, if not surpassed, by the régime of the community reduced to acquisitions."[50]

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49. COMPTOIS, supra, note 7,sec. 374.

50. WALTON, AMOS & BROWN, INTRODUCTION TO FRENCH LAW 279 (1963). Also Ancel says: "For half a century, quite a strong tendency has been shown by spouses making marriage contracts to favour the regime of the separation of property." Ancel, Matrimonial Property Law in France, in FRIEDMANN, supra note 40, at 28.

What are the causes behind this popularity ? It has been stated that one of the factors responsible for this increase in Quebec is that notaries find it difficult to explain the legal regime to their clients and to make them understand it.[51] Apart from this the separation avoids the following drawbacks of the legal and conventional matrimonial regimes :[52] (1) the complications involved in the liquidation of the regime and the necessity of partitions; (2) the dominant role given to the husband in the administration of the property; (3) restraint on the full exercise of the civil capacity of the wife; and (4) subjection of the proprietary interests of the wife to the mismanagement of the husband.

b. Legal aspects

Separation of property as a matrimonial regime had been dealt with in article 1422 to 1425 of the Civil Code. Under the separation of property, the wife retains the administration, enjoyment and free disposition of her moveable and immoveable property. Separation of property can also be secured by a judicial process under the Quebec Civil Code. Article 1318 provides that the wife, when separated from bed and board or as to property only, regains the administration, enjoyment and free disposal of her property.[53]

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51. COMTOIS, supra note 7, sec. 387.

52. TRAVAUX, supra note 11, at 340.

53. C.C. art. 1318. The grounds on which the separation of property may be obtained by the wife are stated in article 1311.

Separation of property permits the full exercise of the civil capacity of a married woman. The married woman has full right over her property and the attendant powers. For example, she can be a director in a company in the separation system, whereas she cannot hold that position under community because the husband is the administrator of her shares and in order to be a director one must have complete control over one's shares.[54] Nor can she join as a partner in a partnership in which her husband is also a partner as it would be a derogation from the marital authority and also the rule of unalterability of the marriage covenants.[55] Even apart from egalitarian concepts, from a practical stand point it may be that a wife who is not engaged in a career has more leisure to manage the properties than her husband. The death of one spouse in the community systems has the effect of disrupting the business activities of the surviving spouse unless an express provision had been made in the marriage contract to protect the business interests.

c. Disadvantages of Separation of Property

The separation system in Quebec suffers from a serious drawback arising out of the freedom of testation. The husband is free

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54. Turgeon, Matrimonial Property Law in the Province of Quebec in FRIEDMANN, supra note 40, at 173.

55. Ibid.

to dispose of his property, the exercise of which may prejudice the interest of the wife. In Fischer v. Holland,[56] the husband left his entire property to his concubine. The court on the facts came to the conclusion that the consorts were common as to the property and therefore, only half the property in the community passed under the will according to article 1293. In this case had the parties been married under the separation system the whole property would have gone to the concubine.

The hardship arising from the unrestricted freedom of testation in Quebec is mitigated by the fact that in most marriage contracts providing for separation of property, there are stipulations for gifts of present or of future property. But all the skill of a draftsman cannot be expected to provide satisfactorily for contingencies like the depreciation in the value of properties, inflation, or the extent of the husband's wealth after fifty years of marriage.

A serious criticism against the separation system is that it fails to provide for a spouse a share in the acquisitions made by the other spouse during the marriage. The conventional separation of property in the civilian systems was criticized as being an "absence of regime".[57] Rejecting the introduction of separation of property as

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56. [1951] B.R. 118.

57. REPORT OF THE MATRIMONIAL REGIMES COMMITTEE, CIVIL CODE REFORM COMMISSION 10 (1966).

the legal regime the Quebec Report[58] observes :

> However, it does happen that the safeguarding of this freedom and independence sometimes proves extremely burdensome for one of the consorts and, in certain cases, even results in real injustice. It is still usual in Quebec households that the wife devote all her time to the care of the family and the husband is the only one able to amass an estate by his work: there then exists the danger that at the end of their married life the wife will not receive any share in the savings, the accumulation and protection of which she herself perhaps made possible.

It may be pointed out that one of the objects of forced share device is to enable the wife to participate in the acquisitions made by the husband and to which she contributed indirectly and even directly. Rejecting the criticism of Macdonald that forced share solutions are rigid and inflexible,[59] and referring to Macdonald's maintenance - and - contribution formula,[60] Professor Rheinstein, says :

> If the forced share laws have indeed no aim other than, that of safeguarding family support beyond the death of the survivor, Professor Macdonald's maintenance and contribution formula certainly achieves it more efficiently than the present laws. . . . But are the forced share laws not meant also to pursue another policy, viz. that of allowing the surviving spouse, especially a widow, to participate in the gains which the husband achieved during marriage ? . . . The forced share laws are meant to make sure that this participation by the widow in that estate, which was accumulated with her help, cannot be thwarted by the husband's testamentary disposition.

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58. Id. at 6.

59. MACDONALD, FRAUD ON THE WIDOW'S SHARE 272 (1960).

60. Rheinstein, Book Review, 59 MICH.L.REV. 806, 810-11 (1961).

5. Proposals For Reform of Matrimonial Regimes in Quebec

Altered social conditions and the increasing economic role of women rendered it necessary to modify the laws of matrimonial regimes in all countries on the continent. In Quebec to overcome the disadvantages and the unpopularity of the legal regime, the Matrimonial Regimes Committee recommended, following the lead of France, the introduction of the regime of partnership of acquests as the legal regime. The Report of the Committee seeks to avoid the criticism levelled against the French regime, that it gives rise to the troublesome necessity of distinguishing between the acquests and the private property during the entire period of marriage. The proposed article 1267 suggested by the Committee says :[61] "The acquests include the proceeds of the work of the consorts during the marriage as well as the revenues and property arising therefrom." The broad outline of the new regime of partnership of acquests recommended by the Committee is stated thus :[62]

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61. Supra note 57, at 31.

62. The Quebec Report, supra note 57, at 10 (Footnotes omitted).

> During the marriage, each consort retains the entire control of his patrimony, and remains fully responsible for his debts: the autonomy of each is complete, save for the obvious need that each contribute, according to his means, to the needs of the household. There is, therefore, no difficulty as to management. If by chance one of the consorts entrusts the administration of his property to the other, the latter will be subjected to the general rules respecting the contract of mandate, under which the mandatory is obliged to render an account, save as to fruits received which will be presumed to have been consumed for the needs of the household. It is only on the dissolution of the regime (by death, separation from bed and board, or separation of property) that a part of the patrimony of each consort will become subject to partition: that part which will have been made up of the proceeds of his work during the course of the regime. Thus property possessed before marriage or acquired subsequently by gratuitous title will not be subjected to partition, nor will the fruits and proceeds of this property, nor effects of a personal character such as souvenirs or tools, implements or other things used in a trade or a profession; but all other property that has not been established by legal proof to be private property will be subject to partition.

The Quebec Bar voiced a strong opinion rejecting the recommendation of the Committee. After drawing attention to the wide preference for the regime of separation in Quebec and the misgivings of jurists to the regime of participation in acquests the Bar stated [63]:

> Les rapporteurs ont fait un travail imposant, mais il ne semble pas que le régime qu'ils proposent puisse être vraiment mis en pratique. . . .
>
> Il ressort de ceci que l'opinion unanime du Conseil général est de recommander que le régime légal matrimonial de base en soit un de séparation de biens.

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63. 27 R. du B. 62-63 (1967).

> Tout en énonçant ce principe général, le Conseil général est conscient de certaines difficultés qu'il faudra résoudre, par exemple : la protection du patrimoine de la femme, soit par la légitime ou encore par une restriction à la liberté illimitée de tester dun conjoint ou à tout autre forme d'aliénation pendant le mariage, à titre gratuit ou à titre onéreux.

Dr. Comtois, the President-member of the Matrimonial Regimes Committee, defended the recommendation.[64] Referring to the community of acquests he says :[65] "Ce régime nous a paru être un compromis acceptable entre la communauté de biens et la séparation de biens." He then proceeded to justify this "compromis acceptable" on the ground that it had been arrived at after consulting five categories of opinions. First, the comments of reputed scholars in comparative law, that is, Professors Jean Carbonnier, René David, Jacques - Michel Grossen and Hahlo favoured the community of acquests. "Il est à remarquer qu'aucun de ces quatre professeurs de droit ne recommande l'introduction de la séparation comme régime légal."[66] Second, Le Conseil général du Barreau du Québec pronounced itself against the community of acquests and favoured separation as a legal regime. On the other hand the notarial profession favoured the regime of acquests as a legal regime. Thirdly, the businessmen recommended the separation of property as the legal regime. Fourthly, La Fédération des femmes du Québec also

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64. Comtois, Pourquoi la société d'acquêts ? 27 R. du B. 602 (1967).

65. Id. at 605.

66. Id. at 606.

favoured separation. Lastly, Dr. Comtois relied upon the views of young men and women as represented by Le service de préparation au mariage de Montréal and La Fédération des étudiants who preferred the regime of acquests.

c. Evaluation

The rejection of separation as a legal regime in Quebec is defended on the ground that none of the eminent foreign professors suggested it. The views of these professors are entitled to the greatest respect, but it would seem that they have minimized the difficulties attendant on the dissolution of the regime especially for simple folk. The opinions of jurists seem to have overlooked the difficulties that result in the community to the business interests of the surviving spouse on the death of the other. The majority of estates are small and the desirability of imposing the complexity of partnership of acquests by making it a legal regime is questionable. Community of property though ideal tends to be complex. Therefore it is submitted that the view of legal profession who are in constant contact contact with the public in Quebec is entitled to a greater weight than that of the professors.

Further, The Quebec Report exhibits a confusion in thought in one respect, namely, in the priority among policies. In all reforms of matrimonial regimes two policies compete for precedence. First is

the equality of the spouses and the second is the protection of the proprietary interest of a married woman. In view of the economic independence of women and the social security measures like the old age pensions, the concept of protection yields priority to the concept of equality.[67] Moreover, equality of sexes has progressed itself from a preferred goal to a human right.

The partnership of acquests is a posthumous community as the spouses are separate as to property during the subsistence of the marriage. It is submitted, as a legislative technique, a forced share principle can achieve the participation of the wife in the acquisitions of the husband in a more simple way than the community. A partial recognition of this fact is found in The Quebec Report[68] which states :

> The adoption of a regime of separation might have been proposed, coupled with a limiting of the husband's freedom of willing by the introduction of a reserve, a legitime or an after-death alimentary obligation. But the advisability of thus upsetting our law of successions seemed highly doubtful, especially since it remains possible under a regime of separation for a consort to reduce his estate to nothing, and thus render the right of his consort illusory, by a variety of more or less fradulent transactions. Moreover, it is clear that the protection which would result from such a change in the law of successions would only apply in the case where the regime is dissolved by death, and this is manifestly unsatisfactory.

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67. Contra, Tees, The Partnership of Acquests as the Proposed Legal Matrimonial Property Regime of the Province of Quebec 14 McGill L.J. 113, 119 (1967).

68. The Quebec Report, supra note 57, at 6.

In the Indian context the first objection voiced by the Committee, namely, the need to upset the well-established law of succession is inapplicable as in our view statutory changes are necessary in the Hindu law of succession. The second objection is that it is possible to reduce the estate to zero. The examination of the New York law, points out that the protection against evasion of the non-barrable share is not an insuperable task and that it can be easily accomplished in India.

The introduction of community of property is unsuited to India for the following reasons :

(1) Though in the remote past, community between the husband and wife existed, separation of property is now definitely the rule under the Hindu, Muslim, Parsi and Christian Laws. Therefore, the introduction of community unknown to the habits of the people is inadvisable.

(2) Introduction of legal community necessitates many changes in ancillary fields like the law of debts, insurance, gifts and taxation.

(3) It needs the introduction of new institutions like tutorship in the case of minors.

(4) Such far-reaching changes are undesirable and impracticable in a country where the majority of people are illiterate.

Summary of Conclusions

(1) From the experience of the West, we find that no serious problems arose by granting equal rights to female heirs and especially to the daughters. On the other hand the equitable distribution of property among all children led to the democratization of the family and society.

(2) The Western legal systems give a definite fraction of the estate to the widow. The principle followed under the Hindu Succession Act is that the widow shares the self-acquired property of the husband along with the other heirs. This principle of the Hindu Succession Act should be retained.

(3) Dower, community and non-barrable shares give protection to the share of the widow only. Generally speaking, the trend in the Western countries is to give protection only to the share of the widow from disinheritance. In India the protection should be given to children as well. This will

prevent the disinheritance of daughters and also act as a substitute for the right by birth, though in a lesser form.

(4) As between flexible and non-flexible restraints, the non-flexible restraints are suited to Indian conditions because they will eliminate the need to approach the courts for relief.

(5) The elective share of New York is not capable of extension to protect all the heirs of the deceased.

(6) Conventional community property is unsuited to India in view of the general illiteracy of the masses and social practices relating to marriage.

(7) Any legal regime is also undesirable, as under the existing law based on separation of property the wife enjoys greater powers. Further, the introduction of a legal regime in India requires many changes in other fields of law like debts, contracts and guardianship.

(8) The introduction of a compulsory portion as a protective device is more suited to Indian conditions.

(9) Joint accounts and insurance policies cannot be used as devices in India to defeat a non-barrable share. Even evasion by <u>inter-vivos</u> transfers can be checked without resort to major changes in the existing laws.

CHAPTER FOUR

COMPULSORY PORTION AND SOME ASPECTS OF ITS PROPOSED APPLICATION IN INDIA

Introduction

In the previous chapter some reasons favouring the forced share principle as legislative technique in India were pointed out. Some additional advantages of such a measure are : (1) It should help to avoid many will-contests as heirs who are not totally deprived of the patrimony will be hesitant to upset the will of the father in the absence of strong grounds. (2) By providing for a compulsory portion, in lieu of the right by birth, the objection that vested rights will be defeated by its abolition will be overcome, so that any lurking fears about the constitutionality of a measure abolishing the right by birth will be removed. (3) It will achieve the basic purpose of many legal systems to prevent capricious disinheritance of an heir and to emphasize the social obligations of a deceased towards members of his family. In India it will help to elevate the status of women by securing for them indefeasible rights of inheritance. In the words of Miraglia :[1]

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1. MIRAGLIA, COMPARATIVE LEGAL PHILOSOPHY 759 (1921).

> Intestacy and testacy can . . . coexist. And their coexistence is essentially necessary since it can be shown that intestacy alone would absorb the whole right of the individual and testacy alone would deny the right of the family. The wisdom of centuries has found harmony in the coexistence of the two kinds of inheritance, in the division of the estate of the "de cujus" into a devisable part and a reserve.

Not only the coexistence of testacy and intestacy but also the synthesis of the concepts of family property and family provision had been achieved by a compulsory portion. The concept of legitima portio in Roman law and of the reserve of the Germanic customs which prevailed in Northern France and their fusion in the Code Napoleon exemplify this principle.

Roman law recognised unlimited testamentary power but found it necessary to limit the power in favour of the near relatives. In particular it must be borne in mind that in the classicial Roman law the acquisitions of the children became the property of the father. An heir unjustly disinherited might bring querela inofficiosi testamenti to recover one-fourth of what he would have obtained on intestacy. The action was available even in cases where a person obtained less than a quarter of his intestate share and was sometimes referred to as quarta Falcidia.[2] Under Justinian the legitima was one-third of the intestate share if the children were

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2. BUCKLAND, TEXT BOOK OF ROMAN LAW 328 (2nd ed. 1932).

four or less and one-half if they were five or more. Ascendants were given one-third of their intestate share. These Roman principles were followed practically without alteration in pays de droit ecrit.[3] It is to be noted that compulsory portion was received not as a share of succession but as a part of the estate. Thus the dominant idea was the duty to provide maintenance to the members of the family.[4]

On the other hand, the concept of reserve which prevailed in the laws of Germanic tribes had its basis on the notions of family ownership of property. This may be defined as the part of a person's property which the law assured to his heirs and of which these heretiers reservataires[5] could not be deprived through donations made to others.[6] Schuster says :

> Germanic law proceeded on the opposite principle; the right to take the estate belonged to the natural heirs, and it was only gradually and through the influence of the clergy that a person was allowed to take a certain portion of his estate away from the heir as the 'dead man's part'.

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3. Dainow, Forced Heirship in French Law, 2 LA. LAW REV. 669, 671 (1940). There were variations in the customs of the South. See BRISSAUD, HISTORY OF FRENCH PRIVATE LAW 741 n. 5 (1912).

4. Ibid. See also BRISSAUD, supra note 3, at 743.

5. Dainow, supra note 3, at 672

6. SCHUSTER, THE PRINCIPLES OF GERMAN CIVIL LAW 626 (1907).

Here we notice a striking resemblance to the Mitakshara law of joint family. Maine points out :[7]

> The ancient German law, like the Hindoo jurisprudence, makes the male children co-proprietors with their father, and the endowment of the family cannot be parted with except by the consent of all its members.

Of this collective right of the members of the household as against the father, Huebner says :[8]

> On the other hand he continued to be bound by so-called rights in expectancy. A right in expectancy in its oldest form, as it appears in a great number of Germanic legal systems, permitted a decedent to dispose freely of only a certain part of his property, the free portion. . . . On the other hand he could not deprive of the remaining portion the heirs who were entitled to expect it. Such rights were usually attributed only to sons . . . in other words, to members of the household community in its narrowest form. In order, however, to make use of his power over the free portion, the decedent was originally bound to have made a partition. . . .

The above passage brings out the close similarity between the Mitakshara concept of joint family and the ancient Germanic customs relating to reserve. It may be pointed out that prior to the passing of the Hindu Succession Act a father was not entitled to dispose of his undivided interest in the joint family properties by a will, and in case he intended to exercise his right of testamentary

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7. MAINE, ANCIENT LAW 198 (9th ed. 1883).

8. HUEBNER, A HISTORY OF GERMANIC PRIVATE LAW 305 (1918) (Footnotes omitted).

disposition, he had to separate himself from the joint family by means of a unilateral declaration of an unequivocal intention. Mayne also draws attention to the fact that the idea of a will is wholly unknown to Hindu law and that "the native languages do not even possess a word to express the idea."[9] Therefore, the limitation on testamentary freedom inherent in the concept of reserve is not alien to Hindu jurisprudence.

The concept of compulsory portion gives rise to the following general questions :

(1) For whom should the protection be given ?

(2) What should be the nature and extent of the reserve ?

(3) How is the net estate to be calculated ? What should be the policy regarding gifts inter vivos ?

(4) When should disherison be permitted ?

The above questions will now be considered with reference to India.

A. WHO SHOULD BE ENTITLED TO THE BENEFIT OF THE COMPULSORY PORTION ?

In contemporary India a joint family consisting of three

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9. MAYNE, HINDU LAW AND USAGE 566 (9th TROTTER ed. 1922).

or more generations is becoming increasingly rare due to changed social conditions caused by ceilings on land-holdings, the need to leave homes in search of employment and the difficulties of accommodation in urban areas. Today an extended nuclear family consisting of husband, wife, children and with one or both of the husband's parents living with them should be taken as representative of the family unit. It is recommended that the benefit of reserve should accrue to the members of this group.

It may be asked why the reserve should be provided for the adult children. A reserve in their favour will reinforce the tendency on their part of assist the parents in the running of the family business or farm. It is conducive to the promotion of the family solidarity. We come across fairly frequently in India an elder brother assisting his younger brothers and sisters financially, whenever possible, in their education. These family sentiments should be encouraged as they are of a beneficial character.

The collaterals should be excluded from the benefit of the reserve. The exclusion of the collaterals is motivated by the policy that collateral succession ought not to be encouraged. Miraglia says [10]:

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10. MIRAGLIA, COMPARATIVE LEGAL PHILOSOPHY 763 (1921).

> A collateral reserve is not based on the philosophy of law because the brothers and sisters are centres of other families, neither is it based on social interest which does not need a limitation of the testamentary power through the enjoyment of a modern reserve by brothers and sisters.

Whether illegitimate children should be included is a more difficult question. The experience of French law shows that by providing a reserve for illegitimate children, the law tends to become complex. Secondly, it is open to the deceased to make a testamentary provision for their benefit. Thirdly, under the Hindu Adoptions and Maintenance Act a minor illegitimate son so long as he is a minor and an illegitimate daughter so long as she is unmarried are enumerated among the dependents of the deceased. Section 22 of the Act states that the heirs of the deceased are bound to maintain the dependents of the deceased out of the estate inherited by them. As the proposed reserve is contemplated in addition to the existing provisions relating to maintenance, the hard cases that may arise in practice are substantially covered barring the case of a disabled illegitimate son.

Whether a compulsory portion should be provided for the parents may give rise to conflicting opinions. Prima facie the position under article 2303 of the B.G.B,[11] which gives compulsory

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11. B.G.B. art. 2303.

portions to parents only in default of issue looks attractive. However, the exclusion of parents from the compulsory portion will conflict with the policies of intestate succession under the Hindu and Muslim laws. In the former, the mother is a class I heir and is entitled to a share of the property of the deceased along with the wife and children. In the latter, the father ranks as a sharer. In view of the recommendation that the interest of the parents in the succession should be limited to a life interest, and also in view of the proposals regarding the quantum of the reserve, a compulsory portion for the benefit of parents along with children and the widow will be justified.

B. WHAT SHOULD BE THE NATURE AND EXTENT OF COMPULSORY PORTION ?

1. Nature of the Right

Should it be a share of the succession or only a claim against the estate ? Under the French Civil Code it was formerly a share of succession but this provision resulted in undesirable fragmentation of farm lands, and the laws of inheritance in France were amended in 1938, 1943 and in 1955, especially articles 815 and 832,[12] to provide that in the case of farms, business interests and

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12. See generally MORAL-LOPOZ, PRINCIPLES OF LAND CONSOLIDATION LEGISLATION 107 (1962).

dwelling-houses the compulsory portion, as in the German Civil Code, should only be a claim over the estate. Under the German law the claim of a person entitled to a compulsory portion "is a money claim against the testator's heirs, which accrues on the date of the testator's death and is capable of assignment and transmissible on death".[13] Therefore, the compulsory portion should be a money claim against the estate of the deceased and should be capable of transfer and assignment. Such a money claim will prevent uneconomic fragmentation of lands and business interests.

2. Some questions as to the amount of the compulsory portion

a. Should it vary with the number of heirs ?

Should the fixed portion be proportional to the number of heirs ? The method of absolute proportionality that prevailed at the time of the French Revolution is undesirable because it takes away the testamentary power of the individual to an undesirable extent. The law of 17 nivose, year II (January 6, 1794) provided that a person could dispose of one-tenth of his estate if he left heirs in the direct line, and of one-sixth if he left collaterals as his heirs. But this disposable portion could be given only to strangers.[14] The Code of

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13. SCHUSTER, THE PRINCIPLES OF GERMAN CIVIL LAW 627 (1907) citing B.G.B. art. 2317.

14. Dainow, supra note 3, at 676. Also BRISSAUD, supra note 3, at 747.

Justinian and the French Code follow the principle of limited proportionality. Maraglia rejects the principle of limited proportionality as "unjust and often ineffective".[15] He says :[16]

> It does not always attain its object, because the ratio should be stopped at a certain point unless one wishes to destroy testamentary power; and by stopping it one decrees an equal portion for five children as for eight or ten. Besides it is not just because it limits capriciously the right of the individual owner and disposer.

Instead he prefers the system of invariable quota followed by the Custom of Paris, by the Code Napoleon and the Italian Civil Code.[17]

One objection to the principle of invariable quota is that it causes hardship when there are many children as the intestate inheritance becomes small. In India this objection should not be taken into consideration as the social interest lies in the limitation of the size of the families and the official policy of the Government supports it. When adopting the concept of reserve in India the principle of proportionality, whether absolute or limited, should be rejected.

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15. MIRAGLIA, supra note 10, at 763.

16. Id. at 763-64.

17. In Italy the reserve for children is one-half of the property, irrespective of their number, art. 805 of Italian Civil Code (See 3.2 PLANIOL 495).

b. Should it be expressed as a fraction of the intestate share or of the estate ?

The Continental codes express reserve as a fraction of the successional portion. However, it is recommended that it should be expressed as a fraction of the net estate of the deceased as under the Muslim law. The two modes of stating the principles do not produce different results in practice but the analogy of Muslim law will make the concept familiar to the legal profession and will enable them to approach the day-to-day problems with confidence. The reserve, in favour of the intestate heirs, it is recommended, should be one-half of the net estate and the deceased should be able to exercise his testamentary power with regard to the other half. The interest of the parents in the reserve should only be a life interest, and on their death the properties should devolve on the wife and children of the deceased or their legal representatives.

c. What fraction of the estate should be reserved ?

An objection may be voiced that to provide only one-half of the estate as the reserve for the members of the family will be inadequate. The problem is essentially one of drawing a line between freedom of testation and giving protection to the members of the family. There should be some power left with the deceased to make an equitable

distribution taking into account the needs and circumstances of his children. Professor Hahlo illustrates the disadvantages and rigidity of the compulsory portion by giving the following example :[18] A father has two sons, A and B. A is wealthy, B is a destitute and cripple. In such cases it will be open to the father to leave to B one-half of the estate thereby enabling B to get three-fourths of the estate. Instances could be imagined where able-bodied children assist the family by their labours and excessive compassion should not lead to unjust results.[19] To meet hard cases it is suggested that section 22 of the Hindu Adoptions and Maintenance Act should be amended so as to empower to courts to grant maintenance in appropriate cases, even when an heir received a portion of the estate under testamentary or intestate succession.

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18. Hahlo, The Case Against Freedom of Testation, 76 SOUTH AFRICAN LAW JOURNAL 435, 445 (1959).

19. According to the texts of Hindu Law congenital blindness, deafness, dumbness, congenital idiocy, incurable leprosy and lunacy, and want of any limb or organ, if congenital, operated as a bar to the right of inheritance. Disqualifications other than congenital idiocy and lunacy were removed subsequently by the Hindu Inheritance (Removal of Disabilities) Act, 1928. Now section 28 of the Hindu Succession Act, 1956 removes all the disqualifications based on disease or deformity.

Another objection voiced against the compulsory portion is that in the case of a large estate, they tend towards the concentration of wealth in the hands of an individual or a small group of individuals because the deceased is restrained from making testamentary disposition in favour of charities and such like laudable objects. The criticism, it is submitted, is valid. Therefore, it should be enacted that the law relating to the compulsory portion will be applicable in case of estat estates exceeding half a million rupees on the first five hundred thousand only and that the rest of the estate be freely available for gifts to charity.

If the amount of compulsory portion becomes deficient on account of legacies made by the testator, the heirs should have the right to have the deficit deducted from the legacies.[20]

C. CALCULATION OF THE NET ESTATE FOR PURPOSES OF RESERVE

1. Aspects Relating to Gifts Inter Vivos

a. General

The question as to what extent gifts inter vivos should be

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20. The Civil Code of Republic of China, art. 1225 provides as follows: A person entitled to a compulsory portion may have the amount of the deficit deducted from the property of a legacy, if the amount of his compulsory portion becomes deficient on account of the legacy made by the testator. If there are several legatees, deductions must be made in proportion to the value of the legacies they severally receive.

considered as part of the estate will give rise to considerable difference of opinion. By the inclusion of gifts inter vivos, the value of the net estate will be enlarged and thereby the value of the reserve portion will also increase correspondingly. Essentially this is a kind of collation. In addition this will permit a right to proceed against gifts, if the devisable portion is not sufficient to satisfy the compulsory portion.

Before considering the above aspects, it will be useful to bear in mind the following features of the Indian law : (1) the law of wills discarded the hotchpot rule; (2) the Hindu and Muslim laws of succession do not provide for collation; (3) as noticed before when dealing with the laws of New York, the evasion of provisions relating to reserve by means of colourable transfers does not present any major problems in India; and (4) revocation of gifts, not of an immoral or unlawful nature, is opposed to the sentiments of the people. Therefore, the right to proceed against gifts inter vivos should be at a minimum.

A problem that arises when considering gifts inter vivos as a part of the estate is their valuation for purposes of calculation. Should they be valued as at the date when they were made or at the time when succession opens ?

For the calculation of the value of the net estate in the French Civil Code all liberalities and legacies are included and debts

are deducted.[21] The gifts are valued as of the date when they are made. This approach will be unrealistic when inflationary conditions are prevailing, as is the case now in India.[22]

On the other hand, the German and Swiss Civil Codes provide a cut-off period for taking into account gifts inter vivos. Generally speaking, under the German Civil Code[23] no gift is taken into consideration if made more than ten years before the death; in the Swiss Civil Code, the period is five years.[24] Whatever may be the period chosen, the core of the problem remains : Should titles be affected by the right ? For the certainty of titles and the promotion of alienability of properties, the rights of bona fide transferees from the donees should be protected. Therefore, if we eliminate the remedy of recovery against bona fide transferees, the question arises : Should there be a remedy, either personal or real, against the donee ? In attempting to answer this question, it is submitted, the nature of the relationship of the donee to the donor is a factor to be taken into consideration. The donees for our purposes may be classified as : (1) third parties (2) children and (3) the wife of the deceased.

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21. French Civil Code art. 922.

22. See AMOS & WALTON, INTRODUCTION TO FRENCH LAW 337, n.3 (2nd ed. 1963)

23. B.G.B. art. 2325. But in cases of gifts to a surviving spouse the period of ten years does not begin to run until the dissolution of the marriage.

24. Swiss Civil Code art. 527.

b. Third Parties

Where the donee has acted in good faith, there is no superior equity in favour of the heirs. Therefore, proceeding on the basis of equitable maxims that "Where equities are equal first in time prevails" and "Where equities are equal law prevails" no remedy should be made available to the heirs against third party donees. It may be asked : Why this solicitude for third party donees ? Where the gift is to a charitable institution, the answer would seem clear. Individuals should be in a position to donate to charity. Often for spiritual as well as for temporal reasons, like reducing the burden of income tax or estate duty, people donate to charities and this should not be hindered. Again it may asked : Would it not be that a person will give away all his property to a charity by an act inter vivos and leave his family in penury ? It is believed that instincts of self-preservation usually dictate against leaving all the property to a charity during one's own lifetime. If this assumption is wrong, then the objection holds good. However, to prevent capricious alienations, it is suggested that on the lines of para 4 of article 527 of the Swiss Civil Code a provision to the following effect should be inserted :[25]

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25. Swiss Civil Code art. 527.

"Gifts are subject to the same reduction as testamentary dispositions, if made by the deceased with the evident intention of evading the rules restricting his freedom of disposition."

In Mitakshara law, notwithstanding the right by birth existing in favour of the sons, a father is entitled to make gifts of ancestral movable properties within reasonable limits, and of immovable properties for "pious purposes" within reasonable limits.[26]

It may rightly be objected that to permit gifts to third parties will enable a person to give away his properties to a concubine at the expense of his wife and other members of his family. The cases that came before the courts in foreign jurisdictions support the validity of this objection. On the other hand, it should not be forgotten that there may well be equities existing in favour of a concubine, as when she had been faithful to her paramour throughout her life, and which require that a gift to her should be upheld. It is submitted that the law in India, as it stands now, is adequate to cope with the cases that may arise in this area. For, section 6 (h) of the Transfer of Property Act[27] provides that no transfer is valid, if made

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26. MULLA, PRINCIPLES OF HINDU LAW secs. 225 & 226. (13th ed. Desai 1966).

27. The Transfer of Property Act, 1882, sec. 6 cl. (h).

for an unlawful purpose or the purpose of the transfer is opposed to public policy. This provision enables the court to decide the validity of a gift to a concubine or an illegitimate child taking all factors into consideration.

The reasoning of the Supreme Court in D. Nagaratnamba v. Kunuku Ramayya[28] fortifies the conclusion that there is no intrinsic violation of public policy, if a gift is made to a concubine not as a consideration for present illicit cohabitation but for past cohabitation. There ~~are~~ one Venkatacharyulu made a gift of some properties belonging to the joint family to his concubine. The widow and the sons challenged the alienations on the ground inter alia that they were for immoral purposes and therefore void. The Supreme Court pointed out that past cohabitation was the motive and not consideration for the gift. They concluded :

> Venkatacharyulu was free to make a gift of his own property to his concubine. The gifts . . . were not hit by sec. 6 (h) of the Transfer of Property Act. But the properties gifted . . . were coparcenary properties under the Madras school of Mitakshara law by which Venkatacharyulu was governed, he had no power to make a gift of even his undivided interest in the coparcenary properties to his concubine. The gifts were therefore, invalid.

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28. A.I.R. 1968 S.C. 254.

Also, if provisions for compulsory portions are enacted, the right of a member of the family in the properties of a person is no longer a spes successionis but is in the nature of a vested right. So in cases of transfers for immoral purposes a declaratory relief would be available to members in a family.

The above view may appear to contradict the general line advocated previously, that in view of the cost and time involved in the judicial process a legislative determination is preferable to a judicial determination. The reasons for the alteration in preference are two : (1) the cases where transfers are made to concubines or illegitimate children are not common and a decision of a court will resolve the matters more satisfactorily, and (2) it takes advantage of the existing law to a considerable measure.

It is noteworthy that the New York Third Report rejected the civil law approach of Louisiana where a forced heir has the power to reach gratuitous transfers not only in the hands of the donee but also in the hands of a purchaser for value from the donee of immovable property.[29] They stated :

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29. STATE OF NEW YORK, THIRD REPORT OF THE TEMPORARY COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES 134, Legislative Document No. 19 (1964).

> It is obvious that this approach shows excessive concern for the forced heir and not sufficient concern for freedom of property transmission and that its adoption would again plague us with all the problems created by dower.

Therefore, taking an overall view, it is submitted that gifts inter vivos to third parties should not be taken into account for purposes of calculating the compulsory portion except (1) when the gifts are made with the clear intention of evading the rules relating to testamentary restrictions; and (2) when the gifts are illegal or opposed to public policy and good morals. A right to proceed against donations should be restricted to the above two instances. But it should be made clear that the rights of bona fide purchasers for value should not be affected. It may be clarified that a person who paid valuable consideration, even though he had notice of the rights of presumptive heirs or the intention to evade the statutory protection, should be protected. Though this may diminish the extent of protection, still it is preferable in the interests of free alienation of property. Again, if the actual working of these provisions indicates deficiencies they can be overcome by enacting more rigorous provisions as in Louisiana.

c. Children

The provisions relating to compulsory portions should achieve a broad measure of equality among children. Here again there is a considerable room for controversy. In the Mitakshara law of joint

family property, the manager is entitled to spend more on one branch or on a member and his discretion cannot be questioned. The assets and liabilities of the joint family are divided among the members as they exist at the time of partition. On the other hand one of the stock arguments raised against giving equal rights of inheritance to daughters is that large expenditures are incurred towards their marriages and it would be unjust to provide an equal share for them. This argument is suggestive of the trend towards the individualization of property. In this context it is necessary to take note of the reprehensible practice of dowry existing in many parts of India whereunder large sums of money are given to bridegrooms by fathers of girls to induce them to marry their daughters.[30] The legislature has by statute prohibited this practice but the social evil still persists. Both dowry and the spending of large sums of moneys on marriages are social evils that need to be eradicated. Therefore, to discourage these practices, such amounts spent in marriages should not be taken into consideration. However, marriage portions given to daughters, as distinguished from dowry, should be regarded as gifts of a testamentary nature. In general a provision on the lines of article 1173 of the Civil Code of the Republic of China is suggested.[31]

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30. The Dowry Prohibition Act, 1961.

31. The Civil Code of the Republic of China, art. 1173.

It states :[32]

> If one of the heirs has, before the opening of succession, received gifts in property from the deceased for the purpose of getting married, setting up a separate home, or carrying on trade, the value of such gifts shall be added to the property owned by the deceased at the time of the opening of the succession, thus constituting together the property of the succession. But this does not apply where the deceased has declared a contrary intention at the time of making the gifts.
>
> The value of such gifts shall, at the time of partition of inheritance from the successional portion of the heir in question.

d. Widow

Gifts of jewellery and clothing, irrespective of their value, made by the deceased in favour of his wife should not be taken into consideration. But other gifts of property like shares, bonds and annuities and gifts of immovable properties should be regarded as testamentary dispositions.

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32. The Civil Code of the Republic of China, art. 1173. This article should be read along with article 1224 of the Code which says : A compulsory portion is determined by deducting the amount of debts from the property of the succession as reckoned according to Article 1173. (Official Translation).

D. DISINHERITANCE

The Hindu Succession Act disqualifies a murderer from inheriting the property of his victim.[33] Also, the descendants of a convert to another religion are disqualified from inheriting the property of the deceased.[34] However, the rules relating to forfeiture of the right to reserve should be on a broader basis because if an heir's conduct towards the deceased had been unworthy or insulting, it would be doing violence to the sentiments of the deceased to provide for a compulsory portion. While enacting these disqualifications, a clear distinction should be drawn between conduct directed against the deceased as such, and conduct which is not directed against the deceased but the acts might have nonetheless wounded the feelings and beliefs of the deceased. Only the former type of conduct should operate as a disqualification. As under the German and the Swiss Codes the testator should have a right to disinherit an heir on the grounds specified

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33. The Hindu Succession Act, 1956, sec. 25.

34. The Hindu Succession Act, 1956, sec. 26.

by law.[35] A disinheritance should be valid only where the testator has stated the ground in his will.[36]

As a matter of legislative technique two approaches are possible : (1) to attempt at a detailed enumeration of the acts of disqualification, and (2) to state the disqualifications in general terms. In view of the fact that India is witnessing a great transformation in social values, the disqualifications should be stated in general terms and the courts should be allowed to evolve the details. It is recommended that an heir should forfeit his right to reserve :

(a) If he had murdered or attempted to murder the deceased. This disqualification should operate whether stated in the will or not.

(b) The testator should have the power to deprive an heir of his compulsory portion on the ground that the heir had grossly insulted him or grievously wronged against him.

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35. B.G.B. arts. 2333 to 2335. Swiss Civil Code, art. 477.

36. Swiss Civil Code, art. 479.

(3) Subject to the above, on all ancilliary matters that arise in this connection articles 477, 478 and 479 of the Swiss Civil Code should be followed.[37]

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37. 477. A testator has the right by will or pact to deprive an heir of his compulsory portion :

1. where he has committed a serious offence against the testator or one of his near kinsmen;

2. where he has seriously failed in the duties laid upon him by law towards the testator or the latter's family.

478. The disinherited person can neither claim a share in the inheritance nor bring the action for reduction.

His share passes, where the testator has not directed otherwise, to the latter's statutory heirs, as if the disinherited person had not survived the testator.

The descendants of the disinherited person have the same right to their compulsory portion, as if he had predeceased them.

479. A disinheritance is valid only where the testator has stated the ground for it in his will or pact.

In an action by the disinherited person to contest the validity of the ground given, the burden of proving its validity is on the heir or legatee who benefits by the disinheritance.

Where this proof is not established or the ground for the disinheritance is not stated, the disposition will be held valid to the extent to which it does not deprive the disinherited person of his compulsory portion, unless indeed it can be shown that the testator made the disposition under an evident mistake as to the ground for the disinheritance. (William's Translation 1925)

E. SOCIO-ECONOMIC CONSEQUENCES

Mainly three types of socio-economic criticisms are levelled against compulsory portions: (1) that they result in uneconomic parcellation of lands which impair farm production; (2) that they adversely affect family discipline; and (3) that they adversely affect the birth rate and cause migration from rural to urban areas. Of these the third consequence, if true, will be of a beneficial character in India. As to the second objection, it does not seem to be borne out by facts.[38] In India for many centuries the sons under Mitakshara law exercised equal rights along with the father in the joint family properties without any apparent ill-effects. So the second objection can also be ignored. Thus, the first objection is the only serious objection that merits consideration.

The uneconomic parcellation of farm lands is voiced as an argument against equal rights to sons and daughters of inheritance and is likely to be advanced even against the concept of reserve. At the outset it should be mentioned that taking this criticism into consideration, it had been proposed that the compulsory portion

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38. Dainow, Forced Heirship in French Law, 2 LA.L.REV. 669, 688 et seq. (1940).

should confer a right of money claim only against the estate. Under the existing law as all the sons are entitled to share properties equally, the argument can be taken to centre round the question of giving equal rights to female members only, or specifically to daughters.

The argument contains a fallacy. First, if fragmentation of farm lands is a main consideration, the choice should be between single heir succession and partitive succession and not between succession among sons only and a succession among all the children. Cecil defended primogeniture on the ground that it avoids parcellingup of lands.[39] The Federal Hereditary Farm Law adopted by the Nazi-Germany in 1933 brings to focus this aspect. Under this legislation a hereditary farm (Erbhofe) could be inherited only by one principal heir.[40] Secondly, equal division without distinction of sex is the rule now under the Dayabhaga law, for the devolution of separate properties under the Mitakshara law and under the Indian Succession Act. Thirdly, the argument has validity only in respect of agricultural properties.

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39. CECIL, PRIMOGENITURE 83 (1895).

40. See 16 Journal of Farm Economics 326 (1934).

Broadly speaking, fragmentation of farm lands can be avoided by the following modes : (1) by permissive arrangements among the heirs; (2) by judicial intervention; (3) by state intervention; and (4) by a combination of these methods. The Hindu Succession Act provides for the first two modes. Section 22 of the Hindu Succession Act provides that co-heirs have a right of pre-emption to purchase an interest in immovable property or business when another heir transfers such interest.[41] In the absence of any agreement between the parties, the court will determine the price.[42] The Swiss Civil Code is also notable for the detailed provisions laid down under it for the prevention of partition of small farms.[43]

To prevent fragmentation of lands, the law of succession should co-ordinate provisions in other enactments and lay down more comprehensive provisions. For example, in the State of Uttar Pradesh, section 178 of the Land Reforms Act, 1950, as amended by the Uttar Pradesh Land Reform (Amendment) Act, 1954, provides that where a court finds that the aggregate area of the holding to be partitioned does not exceed three and one-eighths acres, it shall instead of dividing the holding, direct that it be sold and the proceeds be distributed among

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41. The Hindu Succession Act, 1956, sec. 22.

42. The Hindu Succession Act, 1956, sec. 22.

43. Swiss Civil Code arts. 616-621, especially arts. 620 and 621.

the parties concerned.[44] It is submitted that this should be adopted as a general provision in the law of succession.

In the State of Punjab we come across an instance of the intervention of the State to check fragmentation. Under this legislation the Government is empowered to determine the minimum area which can be economically cultivated as an independent parcel known as a "standard area" in a region. Areas less than this standard area are called fragments which must be registered.[45] Any transfers or tenancy agreements with respect to these fragments are prohibited. Fragments may be sold to adjoining landowners but if they refuse to purchase, the State will acquire them.

Further, to facilitate the purchase by an heir of a co-heir's share in the farm, long-term low-interest loands should be made available as in Japan.[46]

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44. The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, as amended by The Uttar Pradesh Land Reforms (Amendment) Act, 1954, sec. 178.

45. The East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948.

46. See MORAL-LOPEZ, PRINCIPLES OF LAND CONSOLIDATION LEGISLATION 85 & 111 (1962).

PART II : MUSLIM LAW

CHAPTER FIVE

THE CONTEXT AND CONTENT OF QURANIC LAWS

Women's rights of inheritance under the Muslim law do not give rise to the same kinds of problems as under the Hindu law. For example, unlike the Hindu law the right of inheritance is adequately protected. On the other hand the notion that the law is a revealed law and is therefore immutable presents considerable difficulty in introducting any reform. In India no attempt has yet been made to modernize the Muslim law. A historical review will serve to emphasize the fact that the social and political forces considerably influenced the Muslim law in its origin and development.

A. SOCIAL CONDITIONS IN ARABIA BEFORE THE ADVENT OF ISLAM

Arabs before Islam were divided into tribes, which were usually hostile to each other and united only for purposes of offence and defence. In townships like Mecca and Medina the people were stationary but elsewhere the tribes led a nomadic life. "Wine, women and war were the only three objects that claimed the love and devotion of the Arab."[1] They were constantly warring with each other. Their

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1. KHUDA BAKSH, CONTRIBUTIONS TO THE HISTORY OF ISLAMIC CIVILIZATION 165 (1929). For an account of pre-Islamic Arabian life see supra 168-94.

religious beliefs were governed by a "senseless and meaningless polytheism". There was no limit to the number of wives which the Arab could take. The notions of sexual morality differed very much from those of the latter times. Smith observes: "[I]n old Arabia the husband was so indifferent to his wife's fidelity, that he might send her to cohabit with another man to get himself a goodly seed; or might lend her to a guest. . . ."[2] Widows of a deceased person could be inherited like other chattels and, excepting the mother of the heirs, could be married by force. The son, or other heir, put a piece of cloth on the widows (barring the mother) and that constituted his symbolic annexation of them.[3]

The social unit of the early Arabs was the hayy which was composed not of individual families or kinsmen reckoned within fixed degrees of relationship but the whole circle of common blood.[4] In the tribal society the law of inheritance followed the law of booty. The spoils were divided among all the warriors after giving one-fourth to the Chief of the hayy.[5] The property of the deceased person, similarly went to his asaba, (agnates) which in its primary sense meant those who

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2. SMITH, KINSHIP AND MARRIAGE IN EARLY ARABIA 116 (1885).

3. ABDUR RAHIM, MUHAMMADAN JURISPRUDENCE 9 (1911).

4. SMITH, supra note 2, at 56.

5. Id. at 55.

go to the battle together. Thus the rights of inheritance were hinged to the battle-worthiness of the members within the tribe. Under this law minors and women were excluded from inheritance. As pointed out by Smith,[6] the incapacity of women and minors to inherit is easily understandable, for among the nomads, waters and pastures were common tribal property and movable property was constantly being captured and recaptured. With the decay of hayy and the subsequent development of patriarchal organization the incapacity of women was carried over to the familial institutions and notably the law of inheritance.

The position of a father in an Arab patriarchal family was comparable to that of the pater familias in a Roman patrician house.[7] The preference for, and the superior position of, male heirs is indicated by the fact that infanticide of females was common. Succession was governed by the twin principles of parentage and pact (Ahd). An Arab enjoyed full testamentary freedom without any restriction as to the persons upon whom he could leave property or the nature and amount.

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6. Ibid.

7. Abdul Majid, A Historial Study of Mohammedan Law, 27 L.Q.Rev. 28, 29 (1911).

In tune with the prior practice, women and children were excluded from inheritance. The disability of a widow to inherit in the pre-Islamic times is "self-evident" as she herself could be inherited.[8] A verse in the Quran indicates that the conferring of property rights on daughters and sisters was objected to by the men of Medina. From these and other evidence Smith concludes that "the incapacity of women not only to inherit but to hold property -- at least land -- must have been absolute."[9]

B. NATURE AND CONTENT OF QURANIC LAWS RELATING TO INHERITANCE

1. Quranic laws relating to inheritance

In estimating the role of the Prophet as a reformer and the far-reaching transformation brought by him in the Arab society, the central character and basis of Islam deserves mention. "The edifice of Islam was reared upon the ruins of the earlier civilizations. It incorporated old elements into itself, partly transforming them, and added new things of its own creation".[10] This eclectic approach of the Prophet and the graceful synthesis of the old and new seem to have

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8. Sura V. 126.

9. SMITH, supra note 2, at 96.

10. 1 KHUDA BAKSH, CONTRIBUTIONS TO HISTORY OF ISLAMIC CIVILIZATION 44 (1929).

been ignored by the Muslim divines and jurists in the later times.

The Prophet attached great importance to the laws of inheritance. He exhorted his followers to learn the laws of inheritance and to teach them to the people, as they constituted "one half of useful knowledge."[11] The reformative character of the Prophet's mission is fully evidenced in the laws of inheritance revealed by him.

Some of the verses in the Quran refer to the law of inheritance. Prohibiting the forced marriages of widows by the asaba he stated : "Ye, who are believers, are not permitted to inherit women against their will."[12] After the battle of Uhud when numerous Muslims had fallen we find the final crystallization of the law in Sura four, verses eight to eighteen. The following are some of the relevant verses:

> 8. To the men belongs a share of what their parents and relatives leave, and to the women belongs a share of what their parents and relatives leave - whether it be much or little - as a definite share.
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> 9. If the relatives (not entitled to inherit), the orphans and the poor are present at the division, give them some of it and speak kindly to them. . . .

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11. TYABJI, MUHAMMADAN LAW 820 n.4 (3rd ed. 1940).

12. The Quran, Sura IV, 23 (Encyclopaedia of Islam translation).

12. Allah commands you, as regards your children, as follows: to the boy belongs as much as the share of two girls; if however, there are (only) girls (and) more than two, two-thirds of the estate belongs to them and if there is one (girl) to her belongs the half. And the parents shall each have a sixth if (the legator) had children, and if he had no children and (only) his parents inherit from him, his mother shall have a third. If however, he have brothers, his mother shall have a sixth. (All this) after deducting any bequests he may have made or a debt. Ye know not whether your parents or your children be of greater use to you. (This is) an ordinance of Allah and Allah is all-knowing and wise.

13. To you belongs the half of the estate of your wives, if they have no children; but if they have children you shall receive a fourth of their estate -- after deducting any bequest they may have made or any debt.

14. To them belongs a fourth of your estate, if you have no children; but if you have children an eighth of your estate belongs to them -- after deducting any bequest that you may have made or any debt.

15. If distant relatives inherit from a legator, male or female, and he has a brother or a sister, each shall have a sixth; but if there are more, they shall have a third among them after deducting any bequest which he may have made or debt.

16. Without prejudice (this is) an ordinance of Allah. Allah is all-knowing and gracious.[13]

Sura four, verse one hundred and seventy-five supplemented the above verses as regards the rights of the collateral heirs.

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13. Id. Sura IV, verses 8,9,12,13,14,15 and 16.

> They ask thee for a decision. Say: Allah gives you the following decision for remoter kindred: if a man die childless and have a sister, half of what he has is hers and if she die childless, he is her heir; if there be two sisters, two-thirds of the estate belongs to them; but if there be both brothers and sisters, the brother shall have as much as two sisters. . . .[14]

Each of the persons specified in the above provisions is given a definite portion. The remainder of the estate which is generally the major portion goes to the asaba as before. "Their inheritance has been fixed in a general way by the Prophet's saying, 'What is left over from fixed commitments belongs to a man's relatives in the male line.'"[15]

The main features of the principles of succession revealed by the Prophet are: (1) the wife as well as the husband, female heirs and cognates are given the right to inherit; (2) parents and the ascendants are entitled to inherit along with the male descendants and (3) generally female heirs of the same degree receive half the share of a male heir.

2. Foreign Influences

From a comparative stand point the question arises to what

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14. Id. Sura IV, verse 175.

15. Zahra, Family Law, in LAW IN THE MIDDLE EAST 172 (Khadduri and Liebesny ed. 1955).

extent the Quranic law of succession had been influenced by the Persian Sassanian law, Roman Byzantine law, the Cannon law of the Eastern Churches, and the Talmudic laws, with which it might have come into contact.

Roberts is of the view that the inheritance laws of the Quran correspond to that of the Old Testament in that a man's children are first in the order of succession and then his nearest relatives.[16] The Muslim law of legitimacy corresponds to the Law of Hamurabi in that the illegitimate children, if acknowledged by the putative father, are entitled to succeed equally with legitimate children.[17] But compared to the Hebrew Law, the Prophet elevated women to a superior position in social equality, and perhaps they, judged from the stand point of rights to succession, enjoyed the best social status in any patriarchal society existing in those times.

Some scholars are of the view that the Quranic laws, consciously or unconsciously, borrowed directly from the Roman law or indirectly from the Syrian customs in which Roman law was imbedded. Savvas Pasha, Goldziher and Amos in their writings give expression to

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16. ROBERTS, THE SOCIAL LAWS OF QURAN 67 (1925).

17. EDWARDS (ed.), THE HAMURABI CODE 33 (1921).

such a view. This aspect is of considerable interest as Roman law developed itself into a secular law.

In the law of intestate succession, Muslim law resembles the Roman law in the classification of heirs as descendants, ascendants and collaterals, and in the conferment of numerical fractions of inheritance. There are close similarities in the law of testaments also. Ion points out the similarities that pervade the two legal systems in general.[18] However, FitzGerald in a learned article criticized these views and is of the definite view that there is no direct borrowing from the Corpus Juris, as the Sharia differs radically in its character and intent from the Roman law.[19] As to how far the traditions of the Islamic law incorporate customs of a Roman origin, he did not consider in the article. Schacht is also of the opinion that there is no conscious adoption of foreign legal principles.[20] He observed:

> This process of infiltration of foreign legal concepts and maxims into Islamic society through the medium of educated non-Arab converts extended over the greater part of the first century of Islam, but its results became apparent only early in the second century, when the Islamic legal science came into being. That early Muhammadan lawyers should have adopted consciously any principle of foreign law is out of the question.

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18. Ion, Mohammadan Jurisprudence and Roman Law, 6 MICH.L.REV.44, 197 and 371 (1906).

19. FitzGerald, The Alleged Debt of Islamic to Roman Law, 67 L.Q.REV. 81 (1951).

20. Schacht, Pre-Islamic Background and Early Development of Jurisprudence, in THE LAW IN THE MIDDLE EAST 36 (Khadduri and Liebesny ed. 1955).

It would therefore appear that there was no borrowing from an alien system in the law of intestate succession as revealed by the Prophet.

3. Progressive Elements in the Quranic Laws

To what extent do the revelations of the Prophet mark an advance over the pre-existing laws ? The "insolence of primogeniture" is absent and like the Roman law no privileges are given to the first-born. Among the twelve specified sharers in these provisions, we notice that the sons, daughters, parents and the spouse constitute the primary heirs. These heirs cannot be excluded from inheritance, if not otherwise excluded for causes like apostacy. No distinction had been drawn between the father and mother as to the quantum of the share when they succeed to the estate of the deceased along with his children. An outstanding feature of these provisions is that though generally the share of a female heir is half of that of a male heir, her rights extend over the entire property movable and immovable of the deceased, and no disability has been imposed on the basis of nature of property. In England by contrast the devolution of real property, and the holding of land in estate tail male and military tenures operated to benefit the male heirs. Under the Hindu law the ancestral or joint family estates descended exclusively through the lines of unbroken male descent and females were excluded.

When the deceased has left no children but brothers and/or sisters, the mother's share is reduced from one-third to one-sixth. This might have been to prevent excessive concentration of properties in the hands of mothers, especially when we notice that at that period the Arab tribes were constantly fighting among themselves and that these verses were revealed after the battle of Uhud. So far as the right of the husband in the property of the wife is concerned, in the absence of children he is entitled to half, and when he takes along with children, his share is one-fourth. By not alloting a full share in the estate of his childless wife the windfalls arising out of the death of a spouse are kept in check and the equities in tracing the property to its original source are fairly achieved. A wife is under no disability with respect to the control and management of property.

A pertinent observation made by a Muslim scholar on the allotment of shares of an unequal character as between male and female heirs and between children and parents under the Quranic law deserves mention.[21] Zahra observes:

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21. Muhammad Abu Zahra, Family Law, in THE LAW IN MIDDLE EAST 174 (1955).

> In the matter of the difference in the size of the proportions, the law-maker has observed the principle of the heir's need of the property. For this reason the male is granted in most cases twice as much as the female, for the financial burdens of the family fall upon the men, not the women, since it is the man who works and toils to supply sustenance for his wife and children. Similarly, the children receive a larger share of the inheritance than the parents when they inherit together, for the children are usually helpless offspring whose life lies in the future while the parents are well along in it; the children's need for property is therefore, greater, for they are facing life and its obligations.

Of the twelve heirs who are ranked as sharers in the Quranic law of inheritance, eight are females. This is indicative of the fact that the pre-Islamic law of inheritance needed modifications to give rights to female heirs. Another conspicuous feature of the Islamic law of inheritance is the recognition of a distinction between the full and half blood, and between consanguine and uterine heirs. The preference for consanguine heirs over uterine heirs, especially of a consanguine sister to an uterine sister, can be attributed to the patriarchal concepts that prevailed among the Arabs of that time.

C. THE EMERGENCE OF THE SHIA AND SUNNI SCHOOLS AND THE DEVELOPMENT OF TRADITION AS A SOURCE OF LAW

The revelations of the Prophet do not purport to lay down a complete code but only a broad framework of a new law. After the death of the Prophet two major developments occurred in the society of the

Arabs. The first was the emergence of two schools in Islam, based mainly on the political disputes of the time in their theological garb but which have left their clear imprints on the law of succession. The second was the crystallization of the traditions, the "practice", or "model behaviour" of the Prophet as a second source of law and the growth of Muslim jurisprudence.

On whom the mantle of the Prophet should fall upon his death gave rise to serious dissensions. The Shias favoured the hereditary principle to the caliphate and the rights of Ali and his sons. The Sunnis upheld the elective principle. The Sunnis were the victors in the political strife and gained a large number of adherents in later times with the spread of Islam.

The followers of the Shia school are to be found mostly in Iraq and Iran but there are a small number in India. The Shiites are again sub-divided into various schools, arising out of the doctrinal differences, the two most prominent being the Ithna-Asharias (Twelvers) and the Ismaillis (Seveners). The Sunnis also fall into four sub-schools which differ in minor details. These sub-schools arose because different Imams were followed in different regions and their teachings were regarded as authoritative. Thus the Hanafi school prevails in Turkey and among the Muslims in Balkans, in Central Asia and the Indian sub-continent. Also, the vast majority of the Chinese

Muslims belong to this school. The Shafii school is dominant in Egypt, South Arabia, East Africa, Syria and the Indian Archiphelago. The Maliki school finds its adherents in Upper Egypt and in the countries in West and Central African region. The Hanbali school is followed in Arabia.

From the above it becomes apparent that the process of evolution and development of even a revealed law does not have its foundation on theology alone. It is in addition a complex of the political, social, geographical and temporal factors which prevail at a particular stage of its growth. The revelations of the Prophet were the product of the interaction of pre-existing social conditions and the vision of a reformer nurtured in that society. Therefore, law viewed as a social process will be conditioned by these various factors mentioned above.

The second major development of Muslim law after the death of the Prophet is the growth of sunna (traditions) as a source of Islamic jurisprudence.[22] Adams observes:

> Considered from the standpoint of its function, as opposed to the theological theory about it, the tradition of the Prophet has perhaps played even a greater role in Islamic history than the Quran itself, since it is principally in the light of the tradition that the Quran is viewed and understood.

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22. ADAMS, A READER'S GUIDE TO THE GREAT RELIGIONS 305 (1965).

At the outset two questions come to the fore: (1) the authenticity and the sources of these traditions, and (2) the extent to which the traditions were regarded as an inviolable addendum to the Quran since their origin.

In the early periods the meaning and content of sunna varied from time to time.[23] Schacht observes:

> The classical theory of Muhammadan law defines sunna as the model behaviour of the Prophet. This is the meaning in which Shafii uses the word; for him, 'sunna' and 'sunna of the Prophet' are synonymous. But sunna means, strictly speaking, nothing more than 'precedent', a 'way of life'. Goldziher has shown that this originally pagan term was taken over and adopted by Islam, and Margoliouth has concluded that sunna as a principle of law meant originally the ideal or normative usage of the community, and only later acquired the restricted meaning of precedents set by the Prophet.

The authenticity of the large mass of traditions which grew in the name of the Prophet presents by far the most intractable problem in the Islamic law, in spite of the dedicated efforts of the Muslim scholars to weed out the forged and spurious sunna by isnads. Robson mentions that it is believed that al-Bukhari collected about six hundred thousand traditions during his travels and rejected a

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23. SCHACHT, THE ORIGINS OF MUHAMMADAN JURISPRUDENCE 58 (1950) (Footnotes omitted).

substantial number of these; that when his Sahih was compiled there were about seven thousand two hundred and seventy-five of these.[24]

As stated by Margoliouth, the inherent weaknesses of traditions are two-fold. First, there is the absence of evidence that exhaustive records of the Prophet's words and acts were kept. The second, relates to the weakness of the memories of the transmitters, and "the author of the code himself repeatedly confesses that he has forgotten the name of some intermediary or other; and at times he has forgotten the exact words, though he believes he has reproduced the sense correctly".[25]

Schacht in his classic work convincingly demonstrates that "the traditions from the Prophet do not form, together with the Koran, the original basis of Muhammadan law".[26] His researches, confirming the views of earlier scholars like Goldziher and Morgoliouth, prove that the Muslim jurisprudence had its beginnings in the administrative practices of the Ummayads after the First Century A.D.

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24. Robson, Tradition : Investigation And Classification, 41 MUSLIM WORLD 98, 100 (1951).

25. MARGOLIOUTH, THE EARLY DEVELOPMENT OF MOHAMMEDANISM 79 (1914) (Footnotes omitted).

26. SCHACHT, supra note 23, at 40.

One of the primary functions of sunna in Muslim law is to reconcile the conflicting texts of the Quran. A clear illustration of this is found in the law relating to the testamentary bequests.[27] In Sura II, verse 176, a dying Muslim is directed to bequeath his property to his parents and near relations. In the fourth Sura the verses direct the giving of fixed portions to the near relatives. The first question that occurs is as to the interpretation of this conflict in the texts. Can a person exercise his right of testation as to the entire property ? A tradition of the Prophet is cited restricting the power of testation to one-third of the property. The further question remains whether Sura II, verse 176, can be understood as implying that bequests are confined only to relatives. Here we are referred to a story which in effect abrogates Sura II, verse 176, The story is that a Muslim manumitted six slaves who constituted his entire wealth; that the Prophet cancelled this arrangement and allowed him to manumit only two of them. From this the train of reasoning proceeds as follows: The Prophet permitted only a bequest of one-third of the property; also since the legatees are slaves, and an Arab does not have a kinsman as a slave, it follows that a bequest is not restricted to kinsmen.

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27. MARGOLIOUTH, supra note 25, at 77.

The prohibition of bequests to heirs under a will, except with their consent under the Sunni law is attributed to the saying of the Prophet : "No will in favour of an heir unless approved by the other heirs." But the Shiites reject the authenticity of this tradition and consider such a will as valid.[28]

The following rules of the Islamic law of inheritance derive their authority from the traditions: the limitation imposed on bequests to charity to one-third; that there should be no bequests to heirs; that debts should be paid before the execution of the wills. The denial of right of representation in the law of inheritance is based on traditions. The Sunnis exclude the killer from inheriting the property of his victim whereas the Shias exclude him only if the killing is intentional. The Sunnis do not recognise the right of a Muslim to inherit to the property of an unbeliever or an apostate, whereas the Shias recognise the right of a Muslim to inherit to the property of an unbeliever and he is a preferred heir, however, remote, over all his non-Muslim heirs.

The emergence of the Shia and Sunni Schools and the growth of traditions as a source of law point out the importance of temporal factors in the development of Muslim law.

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28. Mahamassani, Muslims: Decadence and Renaissance: Adoption of Islamic Jurisprudence to Modern Social Needs, 44 MUSLIM WORLD 186, 195 (1954).

CHAPTER SIX

AN EXAMINATION OF THE SUNNI AND SHIA LAWS OF INHERITANCE WITH SPECIAL REFERENCE TO WOMEN'S RIGHTS

A vast majority of Muslims in India follow the Hanafi doctrines of Sunni law and the courts presume that Muslims are governed by the Hanafi law unless the contrary is established.[1] Shias come next in the order of numbers. The rights of women in the laws of inheritance applicable to these groups will be considered now. It should be emphasized that notwithstanding their differences, the Sunni and Shia laws have many features in common. The minor differences among the sub-sects of Sunnis and Shias are not material for this study.

A. SUNNI LAW

1. General

The Sunni law regards the Quranic verses on inheritance as an addendum to the pre-Islamic customary law and restricts their operation, relying upon traditions accepted by its exponents, by means of a strict interpretation. In other words, the superior

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1. Akbarally v. Mahomedally, A.I.R. 1932 Bom. 356, 359.

position of male agnates had been preserved to as great an extent as before.

The heirs related to a deceased by blood under the Sunni law are divided into three groups: (1) Zav-il-Furuz (the sharers) (2) the asaba (agnates or "residuaries") and (3) the Zav-il-Arham (uterine relations). The heirs who are neither sharers nor residuaries (asaba) fall into the third category.

The place of residuaries in the scheme of succession under the Sunni law constitutes the repository of the customary law after modifications introduced by the Prophet. The Sunni law classifies residuaries by descent as follows: (1) residuary in his own right, (2) residuary by another and (3) residuary with another. In this classification the residuary in his own right occupies, qualitatively, a position of primacy. He is defined to be "every male into whose line of relation to the deceased no female enters [2]". Therefore, this category is confined to agnatic male relations.

"The residuary by another," according to Baillie's definition, "is every female who becomes or is made a residuary by a male who is parallel to her." [3] The four female heirs grouped in

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2. 1 BAILLIE, A DIGEST OF MOOHUMMUDAN LAW 701 (2nd ed. 1875).

3. Id. at 703.

this category are: a daughter by a son, a son's daughter by a son's son, a full sister by her brother, and a half-sister by the father, by her brother. The female heirs in this category ex facie have an inferior share in the residue as the share of a female heir is half that of a male heir of the same degree.

Residuary with another is every female who becomes a residuary with another female, as full sister or half-sisters by the father who become residuaries with daughter or son's daughters. When it is noted that such other female heir like a daughter or son's daughter is herself a residuary by another it becomes clear that the female heirs in this category are not in a position to derogate the rights of preferred male heirs as such, but only share along with other female heirs.

Under the Hanafi law when residuaries of the three types exist, preference is given to propinquity. This, no doubt, sometimes enables a female heir to inherit to the exclusion of a male agnate. Thus, if a person has daughter, sister, son of a half-brother by father, the daughter and sister each receive a half share.

We find that in the Hanafi law the wife of a deceased though a sharer in every case, is not entitled to take as a residuary. Prima facie the mother of the deceased is also in the same position.

The social conditions of the present day necessitate that the measure of protection and security that a wife is entitled to, should be in no way inferior to that of any other member in the family, either during the lifetime of the husband or after his demise. Therefore a widow's position in the law of succession deserves particular attention.

2. Bequests to Heirs under the Hanafi Law

Before considering the position of a widow under the Muslim law, it would be instructive to examine whether there is a residuary power in the hands of a Hanafi Muslim to correct any hardship that might arise under the law of intestacy. It is beyond cavil that such hardship arises generally in the case of female heirs. The Hanafi law appears to be particularly rigid in not permitting any device whereby the inequities of the laws of inheritance may be rectified.

First, it is to be noted that a bequest to a stranger is valid without the consent of heirs, if it does not exceed a third of the estate, but a bequest to an heir without the consent of other heirs is invalid. The consent of heirs to a bequest must be secured after the succession has opened, and any consent given to a bequest during the lifetime of the testator can be retracted after his death. As the testamentary power exercised by a deceased in favour of an heir operates at the expense of other heirs, it is not an unnatural attitude

to refuse the consent to such bequests.

Second, it is not open to a Muslim to create estates qualified in point of time. The Privy Council in Sardar Nawazish Ali Khan v. Sardar Ali Raza Khan[4] observed:[5]

> In general, Muslim law draws no distinction between real and personal property, and their Lordships know of no authoritative work on Muslim law, whether the Hedaya, or Baillie or more modern works, and no decision of this Board which affirms that Muslim law recognizes the splitting of ownership of land into estates, distinguished in point of quality like legal and equitable estates, or in point of duration like estates in fee simple, in tail, for life, or in remainder. What Muslim law does recognize and insist on, is the distinction between the corpus of the property itself (ayn) and the usufruct in the property (manafi).

The Allahabad[6] and the Andhra[7] High courts are of the view that the gift of a life estate or any other estate of limited duration is not valid under Muslim law after the decision of the Privy Council. The Allahabad High Court stated:[8]

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4. 75 I.A. 62 (1948).

5. Id. at 77.

6. Siddiq Ahmed v. Wilayat Ahmed, A.I.R. 1952 All.1.

7. Shaik Mastan Bi v. Shaik Bikari Sahat, A.I.R. 1958 A.P. 751.

8. Siddiq Ahmed v. Wilayat Ahmed, A.I.R. 1952 All.1, 5.

> From the said decision, it must now be deemed to be finally settled that creation of a life estate or of an estate of limited duration is not possible under the Mahomedan Law. Such an estate not being known to that system of law cannot be created whether by a gift or by a will.

Whether a life estate under a will can be construed as a devise of usufruct and be validated awaits judicial decision. Even after the decision of the Privy Council the validity of vested remainders under Muslim law is open to doubt.[9] Fyzee rightly observes:

> It will thus be seen that the law relating to life interests is now much clearer than before; but difficulties and doubts still remain, and it is submitted that . . . legislation should now be introduced to remove some of the cobwebs which still surround the law regarding limited interests.

Third, the Pakistani Commission on Marriage and Family Laws stated: "According to the Anglo-Muhammadan Law as it prevails at present a childless proprietor cannot gift his property to his wife or bequeath it to his widow on the condition that after his [sic] death the property shall revert to his heirs".[10] Thus, whatever may be the implications and extensions of Nawazish Ali Khan's Case,[11] a donor or testator's intentions can be frustrated by the use of unguarded

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9. FYZEE, OUTLINES OF MUHAMMADAN LAW 252-53 (3rd ed. 1963).

10. REPORT OF THE COMMISSION ON MARRIAGE AND FAMILY LAWS, 1197, 1224, THE GAZETTEE OF PAKISTAN (Extraordinary) dated June 20th, 1956, (hereinafter cited as the Pakistani Report).

11. 75 I.A. 62 (1948).

language in deeds and wills. Fourth, under the Muslim law it is not open to a presumptive heir to renounce his expectancy by a deed executed during the lifetime of the owner. Such a deed confers no rights and is of no effect in law. Though this principle may sometimes operate for the benefit of a female heir, as when a father asks his daughter to renounce in favour of his son, it equally prevents a female heir from securing any benefit.

3. Widow

Under the Hanafi law if the deceased died leaving a child or the descendant of a son, the widow's share was one-eighth of the estate. If, however, he left no child or descendant of a son, her share was one fourth of the estate. It should be remembered that it is open to a male Muslim to take four wives and in such cases the widows together take the share. A wife (as also the husband) is not entitled to "Return" so long as there is any other heir whether he be a sharer or a distant kinsman.

One anomalous aspect of the Hanafi law may be indicated by the following example: If a deceased dies leaving a widow or widows and three brothers, the widow (or widows) will be entitled to one-fourth of the estate, and the three brothers to the residue. Generally, both considerations of affection and fairness entitle her to a much larger share than is now available. Under the present social conditions

prevailing in India the wife of a deceased would be a non-earning member, whereas the brothers of the deceased would be either actual or potential earning members. Though this may help to keep the land in the agnates and thus accommodate the sentiments that prevail in rural communites, it hardly meets the ends of social justice.

Anthropologists tell us that generally in primitive societies the claims of genetic relatives are greater than those of the spouse.[12] "The tie of a married person /in most primitive societies/ is stronger to his kinship group than to his marriage partner". Thus the position of a widow of a deceased in the Islamic law of inheritance, taken as such, is archaic.

To what extent can the testamentary power of the deceased operate for or against the widow ? We have seen before that for the validity of a bequest to an heir, the consent of other heirs is necessary. If the heirs do not consent to a bequest to a wife, her share remains one-fourth (the deceased left no child or descendant of a son); if the consent of the heirs is secured after the succession has opened, her share will stand enlarged up to a maximum

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12. HOEBEL, The Anthropology of Inheritance, in SOCIAL MEANING OF LEGAL CONCEPTS 17 (Cahn, ed. 1948).

of half the estate (1/3 plus 1/4 of 2/3's). Conversely, if a man were to die leaving all his property to strangers and the widow did not give her consent to the bequest she would be entitled to one-sixth of the property and the legatee would take five-sixths. A further curtailment in the share will occur if the number of widows is more than one.

The Muslim law in its approach to restriction on testation imposes an over-all restriction on the power, and unlike the Continental codes, does not seek to protect the individual heir's right to secure a portion of his share. The above example indicates that the technique of Muslim law is not as efficacious as that of civil law.

From this the general conclusion emerges that in a scheme of succession the existence of restrictions on testation and conferment of shares on members within the immediate family circle (viz., the sons, daughters and widow) by themselves are not productive of equitable results commensurate with the natural social obligations of a deceased person. The quantum of the share available to the individual female members (especially the widow) must be substantial. Further, the scheme of succession should be flexible as to assure that in the event of the death of the deceased without issue, the remoter heirs will not stand to gain at the expense of the widow. In this respect, the Muslim law of succession in general, the Hanafi law in particular, fails.

Also, it is preferable that the elements of flexibility to meet special circumstances (like death without issue) should operate suo moto within the scheme itself, rather than be dependent upon the power of testation of a deceased person. For instance, under the German Civil Code, the share of the surviving spouse varies with the degree of proximity of those relations of the de cujus with whom she has to share the estate.[13] Article 900 of the Japanese Civil Code also adopts the same principle.[14]

4. Aspects relating to Dower

The above discussion proceeds on an underlying premise that the Mehr or dower[15] stipulated by a wife at the time of marriage was not substantial, or that no dower was stipulated and the social and economic status of her parents was low.[16] Dower is fixed on the basis

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13. 1 MANUAL OF GERMAN LAW 185 (British Foreign Office, 1950).

14. Japanese Civil Code, art. 900.

15. No discussion of a widow's rights will be complete without a reference to the dower. It is necessary to point out that the word dower is used in a different sense under the Muslim law and is defined as "a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage".

16. The proper dower is determined with reference to the family of the wife's father, when on a footing of equality with her in respect of age, beauty, city, etc. 1 BAILLIE, supra note 3, at 95.

of conditions prevailing at the time of marriage and subsequent events might have altered the financial position of the husband. The changed circumstances have a material bearing on the deferred dower. But, what if the dower stipulated is a large sum ? In such an event the allotment of a larger share to a widow is open to the objection that it will give rise to hardship to other heirs whether near or remote. Also, at the time of the second marriage, a large amount may be stipulated as dower to defeat the rights of succession of the issue of the prior marriage. The fixing of large amounts as dower is common in the Indo-Pakistan sub-continent. As observed by the Pakistani Commission:[17]

> A vicious custom has grown up in our society of fixing an inordinately high sum as Mehr without any intention of paying it. It is often, stated that a large sum has been fixed as Mehr merely as a matter of prestige of the husband or to do honour to the status of the wife. The result is that even in cases where a large amount of dower had been genuinely fixed, a defence is taken if litigation ensues, that the Mehr was not meant to be paid and that the intention of the parties was that it shall never be claimed.

Dower under the Anglo-Muhhummadan law ranks as an unsecured debt and if the amount specified as dower exceeds the value of the estate, the heirs will not be entitled to succeed to any part of it and the wife will be entitled to the whole estate in satisfaction of

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17. Pakistani Report, supra note 10, at 1218.

her dower claim.[18] Therefore, the equitable claims arising out of this type of situation are considerable.

Prima facie the following solutions suggest themselves to meet the problem: (1) to adopt the "hotchpot rule" followed in some jurisdictions with respect to advances made by the deceased towards the dower and take it into account when allotting the intestate share of the wife; (2) to give usufruct only in the estate to a widow and (3) to restrict the amount of dower that may be stipulated by the parties. Apart from the conceptual difficulties and the practical inconveniences involved in the hotchpot rule, it affords no real solution if the specified dower is equal to or greater than the net value of the estate. The second solution - to restrict the nature of the estate taken by a widow to a limited estate on the analogy of Hindu law prior to 1956, or the English law of dower - is open to at least two objections: First, it hinders the free alienability of land and secondly, it is discriminatory in its character, because no similar restriction is placed on the share of a son or daughter. This leaves open for consideration, perhaps the simplest of the three possible solutions, namely, to restrict the amount of dower that could be stipulated in a marriage contract.

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18. MACNAGHTEN, PRINCIPLES AND PRECEDENTS OF MOOHUMMUDAN LAW 94 (2nd Sloan ed. 1890).

Muslim law insists that there should be dower provided for or implied in a marriage contract and the amount so fixed should not be less than ten dirhams (about three to four rupees).[19] Whether the fixation of a maximum limit on dower is open to the objection that it would be opposed to the Sharia seems to be a moot question. Section 5 of the Oudh Laws Act empowers a court to reduce the amount of dower by stating : "Where the amount of dower stipulated in any contract of marriage by a Mohammedan is excessive with reference to the means of the husband, . . . the amount of the dower to be allowed by the Court shall be reasonable with reference to the means of the husband and the status of the wife.[20] " However, this provision appears to be a solitary illustration of legislative intervention in the Indo-Pakistan sub-continent and other states did not follow the lead of Oudh. The Privy Council has held in Zakeri Begum v. Sakina Begum,[21] that the Act does not apply to a case in which a Mahomedan residing outside Oudh marries a woman residing in Oudh.

The view that the courts should by statute be empowered to restrict the amount of dower has been advocated by Sir Syed Ameer Ali,

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19. 1 BAILLIE, supra note 2, at 94.

20. The Oudh Laws Act, 1876, sec. 5.

21. 19 I.A. 157 (1892).

who ranks as a great Muslim jurist, if not the greatest, in the sub-continent. After referring to the provision in the Oudh Courts Act mentioned above he says:[22]

> In other parts of India, however, the courts have no such power; and in cases of dispute award the whole dower to the wife. If she is the second wife, the entire settlement comes to her and reduces to poverty the children of the first marriage. It is a scandalous perversion of the law and leads to pauperisation of the community. I recommend strongly that the Muslim community ought to apply to the legislature for the extension of the Dower Act of Oudh to the whole of India.

In this context it is relevant to mention that the Family Law Reform Commission of Pakistan came to an opposite conclusion in recommending that it should be enacted that the husband will have to pay the Mehr fixed in a marriage contract however high.[23] It is to be regretted that the Commission did not either refer to the views of Sir Ameer Ali on "fancy" dowers or give its views or solutions to the problem of pauperisation of children which may result by enforcing such a provision. With respect, it is submitted that the view of Sir Ameer Ali is to be preferred to that of the Commission.

But Sir Ameer Ali's view that the power to reduce dower should rest with the courts is open to a serious objection that the redress

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22. Ameer Ali, Islamic Jurisprudence and the Necessity for Reforms, 2 ISLAMIC CULTURE 477, 482 (1928).

23. Pakistani Report, supra note 10, at 1218.

will involve considerable expense and delay to the parties, and might hinder poor heirs from obtaining relief. Therefore, it is preferable that the legislature lay down the permissible maximum amount of dower in all cases.

The function of dower in Muslim law today, or the justification advanced in support of it, is that it restrains the husband in the exercise of his unilateral power to divorce his wife. But the utility of dower as an instrument to check arbitrary divorce appears to be open to question. Jones points out that ill-treated wives prefer to free themselves from marriage without Mehr.[24] If the Muslim law of marriage is reformed to correct the abuse of polygamy and unilateral divorce in a more forthright manner, as was done in many Islamic states, the need for dower largely disappears and a statutory limit on dower should not result in hardship. Any public policy based on the consideration that it protects the interests of the wife against those of the husband's creditors is neutralized by the countervailing consideration that it can to an equal measure defeat their rights also. It is submitted, therefore, that with these necessary modifications in other branches of Muslim law, an increase in the share of a widow should be effected.

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24. JONES, WOMEN IN ISLAM 138-39 (1941).

5. Mother

Among the parents, in the Muslim law of inheritance the mother occupies a position of considerable inferiority, which is attributable to the strong patriarchal tendencies that prevailed in Arab society. She is not ranked as a residuary. Though it is frequently stated that she is a sharer and not a residuary, perhaps it is more accurate to say that her position is sui generis in the Hanafi classification of heirs. For, as Tyabji points out, "she is to all intents and purposes, a Koranic co-residuary with the father."[25] When a person dies without issue, leaving behind the mother, father, and husband or wife, the husband or wife takes his or her allotted share. Out of this residue the mother takes one-third. On the other hand, the Shia law interpreting the Quran literally, gives her one-third of the whole, thereby reducing the share of the father to one-sixth if the husband survies, and five-twelfths if the wife survives.

Barring this specific instance, when there are two or more brothers or sisters (full, consanguine, or uterine) co-existing with the mother, she (mother) takes only one-sixth of the estate, notwithstanding the fact that there may be no agnatic descendants.

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25. TYABJI, MUHAMMADAN LAW 853 (3rd. ed. 1940).

Tyabji rightly characterizes this reduction in the share of a mother as anomalous.[26] Thus if the claimants are mother, father and two sisters, the mother's share is reduced to one-sixth, and the father as a residuary, takes five-sixths. Here, the sisters though they do not take any share, curtail the mother's share from one-third to one-sixth. If the deceased left two full sisters and a mother, the Hanafi law gives the mother one-sixth and the two full sisters take two-thirds. The full sisters take the residue in their capacity as female agnates.

The superior rights of brothers and sisters of a deceased as against a mother are objectionable in principle. The Utilitarians advance two convincing arguments as to why succession should pass to the father and mother, rather than to the brothers and sisters, in the event of the death of a deceased without issue: first, on the ground of immediacy in relationship, and second, as a recompense for services rendered and as an indemnity for the trouble and expense of educating the child.[27]

The unsatisfactory nature of a mother's right can also be indicated with reference to the Titled case The Khurka[28] which gave

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26. Ibid.

27. BENTHAM, THEORY OF LEGISLATION 180 (4th ed. Hildreth. 1882).

28. 1 BAILLIE, supra note 2, at 733. Titled cases are cases which involve a difficult question for determination or otherwise instructive.

rise to an interesting diversity of opinion among jurists. The deceased died leaving a paternal grandfather, mother and a sister. According to Abubker[29] the mother should take one-third and the grandfather the remainder. Zeyd stated that the mother should take a third and the remainder between the two others in thirds. Ali gave the mother a third, the sister half and the grandfather the residue. The opinion of Ibn Abbas agreed with that of Ali. Othman was of the view that the mother should have a third and the remaining should be divided between the grandfather and sister.

This case illustrates vividly the rigidity of Islamic law of inheritance. Amidst these diverse opinions one feature is common, that is, the mother's share is fixed at one-third without reference of other facts. The anomalies arise because of the pervasion of the principle of agnancy which is incongruous with the present social conditions either in the Middle East or in India.

Indeed, the distribution of the estate may even be inversely proportional to the affection enjoyed by the heirs during the lifetime of the deceased. If the heirs are two widows, mother and a paternal half-uncle, under the Hanafi law, the widows take one-eighth each, the mother one-third and the paternal half-uncle five-twelfth.

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29. He succeeded the Prophet as Caliph.

From this the general conclusion emerges that in the event of the absence of male or female descendants, unless the nearer female heirs like wife or mother are entitled to inherit as residuaries in their own right, and to the exclusion of the remoter customary heirs, the anomalies in the Hanafi law of inheritance will continue to persist.

6. Collateral Female Heirs

A full sister will be a sharer only in the absence of male and female agnatic descendants, male agnatic ascendants and full brothers. She will rank as a residuary when there is a female agnatic descendant. This variability in her position works to her advantage or disadvantage depending upon the particular combination of heirs with whom she should partake of the estate.[30] But the instances in which she is in a position to get a benefit to the detriment of a male heir appear to be few and far between. When she is in a position of advantage, it is by virtue of her being a female agnate and often her gain is at the expense of nearer female heirs like the wife and mother.

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30. Though it is a somewhat far-fetched illustration The Deenariyah points out that her interest can be even a six-hundredth part of the estate. Where a person left six hundred deenars and a wife, grandmother, two daughters, twelve brothers and one full sister as heirs, the sister's interest in the estate will be one deenar. 1 BAILLIE, supra note 2, at 734.

Under the Hanafi law no female collateral remoter than a sister is entitled to inherit as a sharer. In other words, sister's children will rank as distant kindred (to be postponed to sharers and residuaries), whereas the male descendants of her brother, being agnates share as residuaries. To put it differently, a niece of a Hanafi can succeed only in default of all male agnates.

The Muslim law of inheritance, unlike most legal systems of its time, envisages the three types of sisters, viz., the full, consanguine and the uterine and ranks them accordingly. A consanguine sister occupies a position similar to that of a full sister, except that she must yield preference to a full sister whereever one exists. The uterine brother and sister derive their rights as "children of the mother" from a verse of the Quran.[31] A conspicuous feature of succession among uterine brothers and sisters is that they share equally, constituting as it were, an exception to the well-entrenched rule in Islamic law that a male heir of the same degree is entitled to twice the share of a female heir. Tyabji's explanation of the apparent paradox reveals great insight. He states[32]:

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31. The Quran, Sura IV, verse 115.

32. TYABJI, supra note 25, at 927.

> The underlying principle has already been indicated, why in this instance the rule giving to males twice as much as to females, has not been applied : viz. that the males were given a larger share than the females only in those cases in which the males would have succeeded under the old law, and the females were recognized as heirs for the first time by Islam. But since not only the uterine brother and the uterine sister, but all cognates were excluded by the customary law, all of them were newly entitled heirs under Islam. There was no reason, therefore, to give to the uterine brother preferential treatment over the uterine sister, or any male cognate preference over female cognates,- any more than there was any reason to give preference to the father over the mother in cases where descendants of the deceased survive.

From this it can be argued cogently that, at least in theory, there is no insuperable obstacle to the grant of equal shares to male and female heirs.of the same degree, and that the half share to a female heir was envisaged more as a compromise not to frustrate the pre-existing expectations too greatly.

The scheme of collateral succession, especially with respect to sisters, exhibits the stresses and strains arising out of want of simplicity in structure. Perhaps, it is not accidental that in most of the Titled Cases, sisters, whether full, consanguine or uterine, either together or in severality, figure as heirs. Inspite of the apparent order of preference envisaged in the scheme, we find instances when the intended priority fails or at least fails without any rational explanation.

Three of the Titled cases illustrate the point. In The Mushrukah,[33] the heirs of the deceased were a husband, mother, two children of the mother and full sisters and brothers. The husband took a half, the mother a sixth, and the children of the mother (uterine brothers and sisters) a third, and full brothers and sisters were excluded. This was the opinion of Abubekr. We are told that on the complaint of full brothers that "O commander of the faithful, grant that our father was an ass, still we had one mother", Omar[34] revised his decision and allowed the full brothers to participate along with the children of the mother. The latter view is followed by the Malikis, Shafiis and Ibadis. The prevailing Hanafi opinion adheres to the original position. In India there is no judicial pronouncement on this question.

In the Merwaniyah[35] where the deceased left six sisters of different kinds and a husband, the husband took a half, the full sisters two-thirds, the uterine sister one-third; and the consanguine sister is eliminated altogether.

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33. 1 BAILLIE, supra note 2, at 733.

34. Omar succeeded to the caliphate after Abubekr.

35. 1 BAILLIE, supra note 2, at 734. If the total of the shares exceeds unity the share of each sharer is proportionately diminished by reducing the fractional share to a common denominator, and increasing the denominator so as to make it equal to the sum of the numerators. In this case the husband will take three-ninths, the full sisters four ninths and the uterine sister two-ninths of the estate.

The Muslim jurists stand divided in The Humziyah.[36] The claimants to the estate were three grandmothers on both sides, a grandfather, and three sisters of different kinds. Abubekr and Ibn Abbas were of the view that the grandmothers should have a sixth and the grandfather the remainder. According to Ali, the full sister should have a half, the half-sister by the father a sixth to make up two-thirds, the grandmothers a sixth and the grandfather a sixth. Zeyd was of the opinion that the grandmother should have a sixth, the remainder to be divided between the grandfather, the full sisters and half sister by the father. The uterine sister stands excluded in all these cases which is consistent with the basic norms of the Muslim law. But, if the problem is viewed in the light of equality among the parents, the uterine sister should rank equally with a consanguine sister. These examples also indicate that competing priorities in respect of agnates like sisters and grandfather are not well-settled.

7. Female Descendants

a. Generally

Among the female descendants of a deceased person, the daughter occupies a conspicuous position though inferior to that of a son. At

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36. Ibid.

the time when they were revealed, the Quranic laws constituted the foremost among the progressive laws that recognised a daughter's right to inherit the property of the father. A period of thirteen centuries has elapsed since the inception of these laws and the changed social conditions and the emergence of new attitudes in the familial institutions render a fresh look at these provisions necessary.

Under the Hanafi law, a daughter is a residuary with a son, so that in the residue her share will be half of his share. But in the absence of a son, her position is that of a sharer and a single daughter takes half and two or more daughters share two-thirds of the estate. Two questions call for an explanation in this context : First, why should a daughter not be a sharer in the presence of a son ? Second, why in the absence of sons and when there are a number of daughters, is their share rigidly fixed at two-thirds ? To the first Mulla points out that if a daughter is made a sharer, no residue might be left for the son to partake.[37] As to the second, it was suggested that in the pre-Islamic Arabia, infanticide was common and the number of daughters in a family was not high.[38]

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37. MULLA, PRINCIPLES OF MAHOMEDAN LAW 69-70 (14th ed. 1955).

38. TYABJI, supra note 25, at 849, n. 3.

But the relegation of a daughter to the position of a sharer is apt to cause much injustice. If the deceased has left a son and no other Quranic sharers, he inherits the whole property. If, on the other hand, he left a daughter she takes half the property and the other half may be taken by a distant male agnate say the son of a half-brother of the deceased[39] or the descendants of a true grandfather how high soever as a residuary. Another feature of the succession of a daughter is that her existence does not affect the share of a father or grandfather of the deceased, but reduces the share of a husband or wife, and the mother.[40] A father or true grandfather is a sharer when there are male agnatic descendants. But in their absence, he becomes a residuary with a right to claim to rank with other sharers, when there are daughters or other female agnatic descendants.

The Muslim law does not lay down any special rules to govern the devolution of property of females. Therefore, the discrimination against females inherent in the provisions operates even in respect of property of females. In contrast, under the Hindu law, special

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39. MACNAGHTEN, supra note 18, at 108.

40. VESEY-FITZGERALD, MUHAMMADAN LAW 122 (1931).

rules prevail to govern the succession of Stridhana or a woman's peculium whereunder females rank as preferred heirs or at any rate do not suffer any discrimination.

The Tunisian Law successfully tackled the inequity in allowing a distant male agnate to share the estate with a daughter, by an addendum introduced to article 143 of the Law of Personal Status, 1956. The second paragraph of the addendum provides : "As for the daughter, whether one or many, or the son's daughter, how low soever, she shall take the residue of the estate by the 'return' even in the presence of an agnate in his own right, like a brother or an uncle or the Public treasury".[41] The inspiration behind this reform was to improve the status of women by removing the inequalities in treatment.[42]

b. Son's Daughter

A son's daughter ranks in importance after a daughter among the female descendants by virtue of her position as an agnate. She becomes a sharer only in the absence of a son or son's son and of a daughter. If there is only one daughter, she (son's daughter) takes

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41. The Tunisian Law of Personal Status, 1956, art. 143.

42. Anderson, Recent Reforms in Islamic Law of Inheritance, 14 INT'L & COMP.L.Q. 349, 362 (1965), citing Roussier's article in 12 STUDIA ISLAMICA 138 (1960).

one-sixth. She equals a daughter even against more distant sharers. Thus where the deceased leaves a daughter, son's daughter and a sister, according to Abu Musa the property is to be divided equally between the sister and daughter, and the son's daughter is eliminated from participation. Ibn Masud on the other hand is of the opinion that the sister takes a third, the daughter half, and a son's daughter one-sixth. The latter view prevailed though it involved the reading of the word "daughter" in the same verse of Quran in two different senses.[43]

Though she is a fatherless child and usually of a tender age, she suffers considerable disability or inequity. Thus, if a woman has two sons and one of them dies in the lifetime of the mother leaving a daughter, on the death of the woman the son's daughter is not in a position to claim any property of the deceased in the right of her father. Similarly, if a predeceased son's daughter and sisters are the claimants to the property of the deceased, the son's daughter takes half the property and the sisters the rest. Here, considerations of necessity and the affection point out that a deceased son's daughter should have a preferential claim to the estate.

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43. VESEY-FITZGERALD, supra note 40, at 123.

The strong preference for the male agnates in the Hanafi law finds expression in another direction also. If there is a son's son of equal degree, a son's daughter though she may be in a position to inherit generally, stands excluded because of his presence. If a deceased leaves behind a daughter, husband, mother, father, son's son and a son's daughter, the daughter takes half, the husband one-fourth, the mother and father one-sixth each. But for the existence of a son's son who agnatizes her, a son's daughter would have been entitled to a share and would have ranked in the general reduction.

As compared to a son's daughter, the children of a daughter suffer considerable reduction in rights to succession under the Hanafi law. For, they are ranked as "distant kindred" and stand postponed to the claims of sharers and residuaries. Thus a male agnate, however remote, has a preferential right to succeed over them. Therefore, there is an urgent need to curtail the rights of male agnates as such, and establish nearness of blood relationship as a guiding principle.

8. Principle of Representation

Under the Shia and Sunni laws, the doctrine of representation in the sense of ascertaining heirs who are entitled to succeed (as contradistinguished from the ascertainment of a share), is not recognised.

This rule often results in considerable hardship to the orphaned children of a predeceased child who are in the greatest need of succour. As has been pointed out by the Pakistani Commission[44] there is no sanction in the Quran or any of the authoritative hadith whereby the children of a predeceased son or daughter could be excluded from succession to the property of their grandfather. The exclusion appears to be a strongly entrenched remnant of the custom of the "days of ignorance". In the absence of a father, the paternal grandfather gets the share of a father in the estate of a grandchild but the reciprocal right is denied to the grandchild. The rule is devoid of logic as well as compassion.

The anomalies arising out of the denial of right of representation to children of a predeceased child are generally admitted, and remedial legislation has been introduced in some countries. Articles 76 to 79 of the Code of Egypt attempts to correct the position by resorting to the expedient of obligatory bequests.[45] These provisions lay down that if the deceased omitted to make any provisions for the offsprings of his predeceased child, to the extent

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44. Supra note 10, at 1223.

45. Code of Egypt, arts. 76 to 79.

such predeceased child would have been entitled to inheritance had he survived him, a bequest in favour of the offspring must be granted by the court within the limits of the bequeathable third. The obligatory bequest is subject to the condition that the offspring should not have received a portion from the deceased either by gift inter vivos or settlement during the lifetime of the deceased and any amount so received will be taken into account to compute the obligatory bequest. By this device the Egyptian Code seeks to preserve the general structure of the Islamic law of inheritance.

The Egyptian solution did not find favour with the Pakistani Commission.[46] The Commission rightly pointed out that if a person had five sons and four of them predeceased him, the provision in the nature of an obligatory bequest within the bequeathable third does not do full justice to the orphaned children.[47] The technique of obligatory bequests is open to other objections as well. First it is difficult to conceive that within the bequeathable third an increased provision for a widow and arrangements for the children of a predeceased child could satisfactorily be made. Secondly, in the presence of a male heir

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46. Pakistani Report, supra note 10, at 1223.

47. Ibid.

of the same degree, a female heir's share is half of the male heir's share. The device of obligatory third is apt to cause greater hardship to female heirs by further affecting a reduction in their shares. Thirdly, the tribal anachronisms are not uprooted. Thus if there are a predeceased daughter's children and a distant male agnate the agnate takes two-thirds and the children of the daughter one-third.

In view of the common legal and legislative history which India and Pakistan shared till 1948, the Family Law Ordinance of Pakistan deserves a closer examination.[48] The Ordinance of Pakistan confers on the children of a predeceased child the right of representation and enables them to succeed to the share which their deceased parent would have obtained, had he or she survived the deceased grandparent. This forthright approach not only secures the right of representation but also eliminates the pernicious result of a distant agnate succeeding in preference to the nearer blood relations.

As noted by Professor Anderson, the solution adopted by Pakistan introduces most radical changes in the Islamic law of inheritance.[49] The traditional Hanafi classification of heirs itself

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48. The Muslim Family Laws Ordinance, 1961, ORDINANCE No. VIII of 1961.

49. Supra note 42, at 357.

stands overturned because a daughter's child who is a cognate is enabled to succeed as an agnate.

One feature of the Ordinance of Pakistan deserves mention. If a deceased left a daughter and a predeceased son's daughter, under this law a son's daughter takes two-thirds and the daughter one-third of the estate; whereas formerly the son's daughter was given one-third and the daughter half. With respect, it is submitted that the Pakistani Ordinance in trying to relieve the considerable hardship arising out of want of representation, introduces an anomaly under its provisions. For, a son's daughter is a more distant blood relation than a daughter. It is illogical that a daughter should get a lesser share than a son's daughter and the daughter's position, perhaps inadvertently, has been changed for the worse. However, it needs be emphasised that the root of the anomaly lies not in the recognition of the principle of representation, but recognising it without abrogating the disparity between the shares available to a male and female heirs of the same degree.

The experience of Pakistan serves to underline two important conclusions : (1) any reform within the structure of Hanafi law and in consonance with its classification of heirs is apt to be unsatisfactory

and fail to meet the needs of a modern society; and (2) a reform in the law of succession by means of a concept alien to its scheme, however small, is apt to create fresh difficulties. In sum, the job is one of reconstruction and not of repair.

B. SHIA LAW

1. General

Ameer Ali states that as contrasted with the Sunni law, the Shia law of inheritance is of "the greatest simplicity".[50] The Shia law considers the Quranic legislation, not as an amendment to the pre-Islamic law, but as independent and self contained principles. Therefore, it represents the farthest departure from the pre-Islamic law of inheritance. The remarkable feature of the Shia law is that it does away with the primacy of agnacy; asaba enjoy no privilege over the heirs through females. The bases of inheritance are : (1) Nasab (consanguity) and (2) Sabab (affinity) which may be either by marriage or Wala (special relationship).

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50. AMEER ALI, MAHOMMEDAN LAW 125 (3rd ed. 1908).

The Shia principles of succession as compared to the Sunni law, exhibit a remarkable conceptual modernity. The classification of heirs has the attributes of a modern classification, e.g. (1) parents and children and other lineal descendants how low soever; (2) ancestors (grand-parents), how high soever, and brothers and sisters and their descendants how low soever; and (3) paternal and maternal uncles and aunts of the deceased; and of his parents, grandparents, etc. Shia law allows a testator to bequeath a third of his estate to an heir or heirs without the consent of other heirs. This enables a testator to make equitable arrangements as regards the disposition of the property among his heirs. The specific fractions available to the sharers are open to the same objections noticed before while considering the Hanafi law.

2. Widow

Like the Sunni law, the traditional Shia law holds that the wife is not entitled to the "return".[51] In addition, a childless widow is under a special disability in that she is not entitled to share the lands of her husband.[52] Baillie states:

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51. TYABJI, supra note 25, at 907, See also Glossary.

52. 2 BAILLIE, A DIGEST OF MUHAMMADAN LAW 295 (1869).

> When a wife has had a child by the deceased she inherits out of all that he has left; and if there was no child she takes nothing out of the deceased's land, but her share of the value of the household effects and buildings is to be given to her. It has been said, however, she is to be excluded from nothing except the mansions and dwellings; while Moortuza (may God be pleased with him) has expressed a third opinion to the effect that the land should be valued and her share of the value assigned to her. But the first opinion is that which appears to be best founded on the traditional authority.

The present legal position of a childless widow in the Shia law of inheritance had been stated by Mulla thus: "A childless widow takes no share in her husband's lands, but she is entitled to one-fourth share in the value of trees and buildings standing thereon, as well as in his movable property including debts due to him though they may be secured by a usufructuary mortgage or otherwise."[53] In Aga Mahomed Jaffar v. Koolsom Bebee[54] it was held by the Privy Council that the expression "lands" is not confined to agricultural lands but includes lands forming building-sites. The rigour of the rule is mitigated to a limited extent by the holding in Abdul Hamid Khan v. Peare Mirza[55] that a childless widow is in the absence of other heirs entitled, in addition to her one-fourth all the remainder of the husband's property by the doctrine of return. This decision gives effect to the view

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53. MULLA, supra note 37, at 120.

54. 25 Cal. 9 (1897) (P.C.).

55. 10 Luck. 550 (1935).

expressed by Sir Ameer Ali that, as there is now no machinery to take charge of the Imam's share the residue should return to the wife.[56] The Shariat Act of 1937[57] was not applicable to the agricultural lands in the State of Uttar Pradesh, and no enactment was passed extending the application of the Shariat Act to them. Therefore, the disability still continues to exist.

3. Other Female Heirs

From the particular rights expressly stated in favour of female heirs the law infers similar rights in favour of remoter female heirs.[58] This approach achieves a wider extension of the spirit pervading the Quranic law in respect of the rights of female heirs, and does not suffer from the anachronisms arising out of a restrictive attitude towards the Quran. As pointed out by Professor Anderson, the Shia law of inheritance reflects the modern conception of the family as primarily consisting of the married couple and their children and is in consonance with the modern life.[59]

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56. 2 AMEER ALI, MAHOMMEDAN LAW 148, n.3 (3rd ed. 1908).

57. The Muslim Personal Law (Shariat) Act, 1937, p. 268 infra.

58. TYABJI, supra note 25, at 929.

59. Anderson, Changes in the Law of Personal Status in Iraq, 12 INT'L & COM.L.Q. 1026, 1031 (1963).

The mother enjoys a better position under Shia law than under the Hanafi law of inheritance. In the absence of children she takes one-third of the whole estate even if it affects a reduction in the share available to the father. Thus, if the deceased left behind a father, mother and husband, the mother gets one-third, husband one-half and father one-sixth.

On the other hand, a sister, under the Shia law may find herself to be in a position of relative disadvantage as her status as a female agnate does not find recognition in its scheme. Thus if the deceased leaves behind a widow, mother, daughter and a sister, the sister would be excluded from inheritance. As the rights of the agnates are not recognized, the daughter gets a higher share under the Shia law. So too if the deceased left behind a mother, daughter and a brother under the Shia scheme the mother gets one-fourth and the daughter three-fourths of the estate where as under the Hanafi scheme the mother gets one-sixth, the daughter half and the brother one-third.

The children of a predeceased daughter are entitled to succeed on the strength of their propinquity instead of being postponed, as in the Hanafi law to distant agnates. Thus, if a Muslim dies leaving behind daughter's daughters or sons, father's

mother and a full brother, the daughter's daughters being Class I heirs would have succeeded to the exclusion of other claimants; whereas under the Hanafi law they would have been excluded altogether.

One notices a conspicuous omission of a widowed daughter-in-law as an heir in Islamic law of inheritance. As the remarriage of widows was common in Arabia, perhaps there was not any sociological necessity to provide a share for them. In India, under the Hindu law along with the recognition of a widow's right to inheritance, progressively the rights of a widowed daughter-in-law and of a widow of a predeceased son of a predeceased son came to be recognised. The social factor that widow-remarriages are not prevalent among the higher castes provides a justification for such a position. On this aspect no studies appear to have been conducted as to the prevailing customs among the Muslims in India on widow remarriages. It is, therefore, difficult to venture any opinion on this question. If the trends indicate that widow remarriages are not common, then, a childless widowed daughter-in-law should be given a right to represent her husband, and if she had issue by the predeceased son a right of representation along with his issue. Her interest should be for life and defeasible on her remarriage.

C. AVAILABLE MECHANISMS TO MODIFY OR DEFEAT THE RIGHTS OF INHERITANCE UNDER THE MUSLIM LAW

Under the Muslim law the estate of a person can be reduced to the detriment of his intestate heirs by creating waqfs and by means of gifts. In addition a Muslim is in a position to acquire the power of unlimited testation by registering his marriage under the provisions of the Special Marriage Act, 1954. These devices will now be considered.

1. Waqfs

The statutory definition of a waqf is "the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable."[60] A waqf inter vivos is completed in the view of Abu Yusuf by a mere declaration of the settlor and this has been accepted by the High Courts of Calcutta,[61] Patna,[62] Lahore,[63] Madras,[64] and Bombay.[65] According to Muhammad the creation of a waqf is not complete

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60. The Mussalman Wakf Validating Act, (1913) sec. 2 (1).

61. Govinda Chandra v. Abdul Majid, [1944] 1 Cal. 329.

62. Muhammad Ibrahim v. Bibi Maiam, 8 Pat. 484 (1929).

63. Zaffar Hussain v. Mahomed Ghiasuddin, 18 Lah. 276 (1937).

64. Patnu Kutti Amma v. Nedungadi Bank, Ltd., [1938] Mad. 148.

65. Husseinbhai v. Advocate-General of Bombay, 22 Bom.L.R. 846 (1920).

unless the superintendent (mutawalli) is appointed and the property is delivered to him.

A waqf may be private or public. It is a private waqf when its object is to benefit the settlor's family and his descendants. Such private waqfs are valid after the Mussalman Wakf Validating Act, 1913[66] provided there is an ultimate gift to charity, even though the gift to charity may be of an illusory character, and even though the settlement may be creating "a perpetuity of the worst and most pernicious kind". Further, if the person creating the waqf is a Hanafi Mussalman, it is open to the settlor to reserve an interest in the property so dedicated for his own maintenance during his lifetime or for the payment of his debts.[67] The settlor may constitute himself the first superintendent (mutawalli).[68]

It is open to the person creating the waqf to specify the heirs or the line of descendants who are to take the benefit of the waqf created by him. When general terms like "child" or "children" are used, daughters are entitled to take the benefit of the waqf

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66. The Mussalman Wakf Validating Act, 1913, sec. 3(b).

67. MULLA, PRINCIPLES OF MOHAMEDAN LAW 176 (14th ed. 1955).

68. Id. 170.

equally with males. However, daughter's children and their remoter descendants are not entitled to share the benefit with descendants in the male line unless some special term clearly indicating such an intention is employed.[69]

The creation of a waqf-alal-aulad (for descendants) is open to objection not only on the ground that it ties up properties and cripples the economy of a country but also that it frustrates the policy of the law of succession. Professor Anderson says: "The system was continually used to evade the restrictions of the Islamic law of inheritance and favour some heirs, or disinherit others, or impose the most arbitrary and unreasonable conditions as the price of their continued entitlement."[70]

For these reasons, the reform of the law of waqfs engaged the attention of the Muslim countries in the Middle East. Turkey took the decisive and drastic step of liquidating waqf in 1926, and was followed by Syria in 1949. Egypt adopted a less radical measure.

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69. WILSON, ANGLO-MUHAMMADAN LAW 353 (6th Ali ed. 1930).

70. Anderson, Recent Developments in Sharida Law IX, 42 MUSLIM WORLD 257 (1952).

Article 5 of the Egyptian Code laid down that the public waqfs may be and the family waqfs must be of temporary rather than perpetual character and that the family waqf shall not extend to more than two series of beneficiaries.[71] In Lebanon the Law of Family Waqfs enacted in 1947 largely followed the Egyptian reform.[72]

The Pakistani Commission also recommended that the Waqf-Alal-Aulad Act, 1913 /The Mussalman Wakf Validating Act, 1913/ should be replaced as it had outlived its usefulness.[73] The Commission did not suggest any legislative measure, incorporating a positive policy as a substitute. It is submitted with respect that a mere negative approach of repealing the Mussalman Wakf Validating Act, 1913, is apt to create confusion as it would once again lead the courts to decide on the basis of the principles of Muslim law. It is also to be noted that nothing contained in second chapter of the Transfer of Property Act, 1882, shall be deemed to affect any rule of Muslim law.[74] Therefore, the more forth-right solution of abolishing all waqfs-alal-aulad, as is done in

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71. THE EGYPTIAN CODE, Art. 5.

72. See generally, Anderson, supra note 72.

73. Pakistani Report, supra note 10, at 1224.

74. The Transfer of Property Act, 1882, section 2. Chapter two of the Transfer of Property Act deals with transfers of property by act of parties.

Turkey and Syria, is best suited to the exigencies of the times. Muslims desirous of creating family settlements would be entitled to do so under the Indian Trusts Act, 1882.

2. Gifts

If a person who is in a sound disposing state of mind divides his property during his lifetime among heirs or non-heirs chosen by him and puts them into possession, the disinherited heirs have no remedy. As Muslim law insists on the transfer of possession in a gift, no colourable acts short of gifts are effective to defeat the rights of inheritance. Any attempt to check this type of transfer would amount to an infringement of the right of alienation of an individual. Further, a gift made during death-illness (marz-ul-maut) is subject to the same restrictions as a testamentary disposition.[75] Therefore, the existing restrictions are adequate to prevent disinheritance of females by making gifts. If, however, it is found that gifts are still resorted to to defeat the rights of female heirs, then it should be enacted that a gift made two years before the death of a deceased is a death-bed gift and is subject to restrictions applicable to such gifts.[76]

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75. TYABJI, MUHAMMADAN LAW 817 (3rd ed. 1940).

76. The view taken here with respect to gifts inter vivos is different from that in the Hindu law. The reasons for this change are two-fold: (1) Under the Muslim law a person is entitled to dispose of only one-third of his property by a will and (2) to minimize the changes in the law.

3. Registration of a Marriage Under the Provisions of the Special Marriage Act, 1954.

At the outset it should be mentioned that this device is new and is rarely employed for the purpose of defeating the rights of inheritance specifically. The Special Marriage Act, 1954, not only provides for a form of civil marriage but also permits the registration of marriages solemnized under a different form under its provisions.[77] One of the consequences of such registration is that succession to the properties of the parties and to that of their issue would be governed by the provisions of the Indian Succession Act, 1925.[78] The scheme of succession under the Indian Succession Act, 1925, is based on provisions relating to the distribution of Personal Property prior to 1938 in England. The Act does not draw a distinction between Real and Personal properties and also confers an unfettered right of testamentary disposition. Therefore, the freedom of testation available under it is open to the objection that a disposition of property in violation of the social and familial obligations is permitted. But the trends indicate

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77. The Special Marriage Act, 1954, section 15. The Act applies to Hindus also but in the case of Muslims it defeats the protection against testamentary disposition.

78. The Special Marriage Act, 1954, section 21.

that the Act is being used for beneficial purposes and is not being misused.[79] Fyzee observes:

> To my own knowledge a number of older couples are registering their marriages in order to be governed by the provisions of the Indian Succession Act whereby they can dispose of their property in accordance with their own wishes, so that it does not go after them to persons for whom they have no regard or affection, by the letter of the Shariat or the dharma (the religious laws of the Muslims and Hindus respectively).

The provisions relating to intestate succession under this Act are not open to question as being discriminatory as heirs of the same degree are entitled to succeed equally irrespective of their sex. Therefore, the freedom of testation under the Indian Succession Act should be restricted to one half of the property of the deceased to prevent any possible abuse of the unfettered right of testation.

CONCLUSIONS

1. Dower, whether prompt or specified, should be restricted to a specified maximum.
2. Children of a pre-deceased child should be entitled to represent their deceased parent.

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79. Fyzee, Major Developments in Muhammadan Law in India, 1850-1950, Seminar paper in the Institute of Islamic Studies, McGill University, Nov. 1958.

3. The property of a deceased should devolve according to the following principles:
   (a) The widow, sons and daughters and parents should share the estate of the deceased equally.
   (b) When the parents inherit the estate along with a child or children of the deceased their interest should be a life interest only.
   (c) If the deceased dies without leaving any children the widow should be entitled to one-half of the property and the other half should be taken by the parents.
   (d) If the deceased left only one child or a child of a predeceased child as an heir along with parents, the child or child of a predeceased child should be entitled to one-half of the property.

4. No collaterals remoter than brothers or sisters or their children should be entitled to succession.
5. The creation of wakf-alal-aulad to defeat or modify the rights of inheritance should be declared invalid.
6. Subject to the existing restrictions on testamentary dispositions under the Muslim law, a Muslim should be permitted to dispose his property by a will to an heir or an non-heir.

CHAPTER SEVEN

INTERACTION OF ISLAMIC LAW WITH CUSTOMARY LAWS

Granted that there are unsatisfactory features in the Muslim law of inheritance, there is a special problem pertaining to reform; namely, the argument that the Quranic laws are revealed and therefore, immutable. The purpose of this chapter is to cast away the argument that the Muslim law cannot be changed.

A. INTERACTIONS OF ISLAMIC LAW WITH OTHER LEGAL SYSTEMS OUTSIDE INDIA

When the Islamic civilization spread from its original home to distant lands, it perforce interacted with the pre-existing legal systems; the displacement of prior legal institutions by those of Muslim law could not be achieved by the mere conversion of peoples of other lands. The explanation to this paradox may be found in the following statement of Gareis:[1]

> [T]he legal system is essentially influenced by the qualities of its elements, ---that is, the nature of the land occupied and the people who constitute the state. Legal standards, consequently, depend on climate, geographical situation (mountains, sea shore etc.), national character, national predisposition, the leading

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1. Gareis, Science of Law, in 1 MODERN LEGAL PHILOSOPHY 68 (1911).

occupation of the people, their history, customs, morality and similar influences. Economic considerations and the necessities of society, which in turn affect the legal system, also in part at least depend on these influences.

The truth of the above statement is borne out by a study of the interaction of Muslim law with the customary laws not only in India but also in Africa and Indonesia.[2]

The dominance of adat law and not of Muslim law is a conspicuous feature of the Indonesian legal institutions, though Islam finds more than two hundred million adherents there. Prins writing in 1951 observes:[3]

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2. This forms part of a general occurrence in the development of legal institutions and is not restricted to the developments in Muslim law alone. For example, Professor Anderson draws an analogy between the development of the Roman-Dutch law in Europe and of Muslim law in Africa. In Europe, in the territories where the Roman-Dutch law now prevails, originally the customs of Germanic origin were prevalent. At a later stage, the rediscovered Roman law began to penetrate through the Church and the universities. In its further development, the need for a more mature legal system was felt by more sophisticated people, and Roman law was received. But Roman law did not succeed in displacing the customary law and the resultant of the interaction was the emergence of an amalgam of the two legal systems. Professor Anderson points out that these different stages of the interaction-processes are to be found in different regions of Africa.

   Anderson, Relationship between Islamic and Customary Law in Africa 12 JOURNAL OF AFRICAN ADMINISTRATION 228, 230 (1960).

3. Prins, Muslim Religious Law in Modern Indonesia, 1 DIE WELT DES ISLAMS 283, 285 (N.S) (1951).

> Now the most interesting issue of (muslim) Indonesian 'adat' law is up to the present shariat has not succeeded anywhere in wholly conquering the above mentioned sections of juridical life. Even the institutions of relationship, of matrimony and succession-law did not become the unrivalled domain of shariat.

His study points out the rich diversity in the legal institutions of Indonesia. For instance, among the Semendo people the eldest daughter in each family has the right of primogeniture. On the other hand we notice that among the Lampong sub-clans, the law of primogeniture is observed for the benefit of the eldest son.[4]

In the Federation of Malaya, the Muslim law of succession is varied by the customary law. The inroad of these customary laws appear to have improved the position of a widow. It is stated:[5]

> The adat, or local customary law, has, however, made variations to this scheme of distribution. It favours particularly the widow whose share of the estate (as in the case of a divorce) may be one-half or one-third depending upon whether the property was jointly acquired by her husband during his lifetime and whether she helped to work, cultivate or acquire it. If she did then she is entitled to half of the property; if not, then one-third, but in addition to her distributive share in the estate.

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4. For an account of the recent development see Lev, The Supreme Court and Adat Inheritance Law in Indonesia, 11 AM.J. COMP.L. 205 (1962).

5. MALAYA AND SINGAPORE THE BORNEO TERRITORIES, THE DEVELOPMENT OF THEIR LAWS AND CONSTITUTIONS 393-94, (ed. Sheridan 1961).

> The adat too affects the devolution of land on death. In areas which practise the matriarchal adat, the adat perpateh, land belongs to the tribe and vests in its female members.

Even in strongholds of Islam, the existence of customary law contrary to the Sharia is noticeable. In Morocco though Islam had taken deep roots for centuries, the usage proved stronger than the Sharia and the daughters did not inherit.[6] Among the Kabish of Sudan, only the males in the family share the estate and female heirs of the intestate receive small portions and not the share fixed by the Quran.[7] As pointed out by Coulson:

> Nor was it only in outlying provinces of Islam, nor among those peoples whose conversion to the faith took place at a relatively late date, that Sharia law failed to supersede existing custom. Certain Arab tribes of the Yemen never relinquished their established customary law under which, inter alia, women did not enjoy any proprietary rights.

B. POSITION OF CUSTOMARY LAWS IN INDIA

1. Before the Shariat Act

We find similar developments, as noticed above, in India also. An examination of customary laws is relevant even today as

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6. LEVY, THE SOCIAL STRUCTURE OF ISLAM 98 (1957).

7. COULSON, A HISTORY OF ISLAMIC LAW 137 (1964) (Footnote omitted).

the devolution of agricultural properties in some states is still governed by the customary laws. In spite of their intimate contact with Islam for centuries and their being ruled by Muslim kings over long periods, the Muslim inhabitants in the Punjab were governed by the customary laws and not by Muslim law. For, the well established socio-economic organizations of India known as village communities proved impervious to change despite the adoption of a new religion by the inhabitants. As observed by Boulnois and Rattigan:[8]

> The Indian village system had its foundation in the communal principle, the essential feature of which is that whilst the individual householder may be supreme head of his own family within the narrow limits of his own homestead, he is still bound, as a member of the community, to conform strictly to all the village rules and usages with regard to the rotation of crops, the rights of pasturage, the alienation of lands and the liability to share the village burthens. These customs and usages have no conern with religious thought; they govern alike the Jat, the Sayad and the Brahman, for upon their general observance depends the maintenance of the village political organization. Here there is no scope for either the strict Brahminical law or the Sharah, and thus it is that village customs as a rule drift down from one age to another without any perceptible change. 'The village communities,' wrote Lord Metcalfe, 'are little republics, having nearly everything they want within themselves, and almost independent of any foreign relations. They seem to last when nothing else lasts'.

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8. BOULNOIS & RATTIGAN, NOTES ON CUSTOMARY LAW AS ADMINISTERED IN THE COURTS OF THE PUNJAB 27 (1878).

Therefore, section 5 of the Punjab Laws Act laid down that custom shall be the rule of decision save where it is contrary to justice, equity and good conscience, and has not been declared void by competent authority. It had been expressly provided that the Hindu and Muslim laws shall not be the rule where they have been modified by custom.[9]

Under the customary laws of the Punjab we find, strongly akin to the position of Hindu women, that Muslim women were deprived of their rights to inheritance, whenever near heirs in the male line existed. Referring to these customary laws of the Punjab relating to succession Rattigan says:[10]

> There are four leading canons governing succession to an estate among agriculturists: first, that male descendants invariably exclude the widow and all other relations; second, that when the male line of descendants has died out, it is treated as never having existed, the last male who left descendants being regarded as the propositus . . . third, that a right of representation exists . . . and fourth, that females other than the widow or mother of the deceased are usually excluded by near male collaterals, an exception being occasionally allowed in favour of daughters or their issue chiefly amongst tribes that are strictly endogamous.

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9. The Punjab Laws Act, 1872, sec. 5.

10. RATTIGAN, A DIGEST OF CUSTOMARY LAW IN THE PUNJAB 103 (14th Sarin ed. 1966).

The custom whereunder sons are first entitled to inheritance whether the deceased was living jointly with others or not prevails among the Muslims in the Punjab.[11] Also we find the existence of the custom among the Muslims that in the presence of a male descendant of a deceased his widow is ordinarily entitled only to maintenance, whether such descendant is the issue of the surviving widow or of another wife.[12] A more anachronistic feature of the customary laws is the exclusion of the daughters by collaterals. These customary laws reveal a strong preference for agnatic kindred and impose qualitative and quantitative disabilities on women's rights to inheritance. Qualitatively, a mother and a widow get a life interest and not an absolute interest.[13] Quantitatively, daughters are excluded not only by the male descendants of the deceased but even by collaterals. Referring to the exclusion by collaterals, Rattigan[14] says:

> A daughter only succeeds to the ancestral landed property of her father, if an agriculturist in default:-
>
> (1) Of the heirs mentioned in the preceding paragraph, [male lineal descendants, widow and mother]; and
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> (2) Of near male collaterals of her father, provided that a married daughter sometimes excludes near male collaterals, especially amongst Muhammadan tribes.

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11. Id. para 6. For instance of custom, Id. 117.

12. Id. 123.

13. Id. para 22.

14. Id. para 23.

(a) where she has married a near collateral descendant from the same common ancestor as her father; or

(b) where she has, with her husband, continuously lived with her father since her marriage, looking after his domestic wants, and assisting him in the management of his estate; or

(c) where, being married to a collateral of the family she has been appointed by her father as his heir.

Even in the absence of strong social organizations like the village communities in the Punjab, the prevalence of customary law is noticeable in India. Prior to 1920, Cutch Memons and Khojas were governed by the Hindu law in matters relating to inheritance and succession. The early authoritative pronouncement on this point was The Kojahs and Memons' Case.[15] The question for decision was whether a rule of succession among particular sects of Muslims at variance with the rule laid down in the Quran could be given effect to by the courts.[16] Specifically, in the Kojah Case the daughters and wife of the deceased sought a declaration that they were entitled to shares in the estate according to Muslim law. Adverting to the issue of the binding effect of a Divine law Perry, C.J., observed: "Whenever, therefore, a question arises as to the binding effect of a law believed

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15. Perry's Oriental Cases 110 (1853).

16. Ibid.

to be Divine by any particular cast, [sic] the true inquiry for a Court of Justice is, how far that law has been recognised, or sanctioned or adopted by the ruling power."[17] It was held that the Hindu law relating to succession applied to them and that the female heirs were not entitled to shares in the estate.[18] The Cutch Memons Act of 1920, under section 2 and the Cutch Memons Act, 1923,[19] enabled Cutch Memons resident in India to be governed by Muslim law by filling a declaration before the prescribed authority.[20] The Cutch Memons Act of 1938, repealing the Act of 1920, declared that all Cutch Memons shall be governed by the Muhammadan law in all matters of inheritance and succession. But Mulla rightly points out that it is not within the competence of the legislature to extend the operation of the Act as to affect the agricultural property in the Governors' Provinces,[21] and succession to agricultural lands continues to be governed by the Cutch Memons Act, 1920.

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17. Id. at 123.
18. The Cutch Memons Act, 1920, sec. 2.
19. The Cutch Memons Amendment Act, 1923.
20. The Cutch Memons Act, 1938.
21. MULLA, PRINCIPLES OF MOHAMEDAN LAW 23 (14th ed. 1955).

Apart from the above two denominations, Halai Memons, Sunni Bohras of Gujarat, and Molesalam Girasias of Broach, were governed by their respective customary laws. It is also significant that the Muslims in the West coast (Mōplahs) followed the matriarchal Marumakattayam law and not Muslim law. Adverting to this Hamid Ali says:[22]

> Hence being possessed of property and following the rule of Nepotism when they became Muslims, they did not adopt Muslim law completely all at once, for as we have attempted to show previously, it is impossible to do so in pratice, whatever may be said in theory, because the Moplahs of North Malabar, who were natives of the land, were the products of the place and time in which they were born, so different from the social conditions prevailing in Arabia that the laws and customs of the latter could not be expected to suit all at once a people so much opposed in their lives and outlook from the wandering Arabs of Arabia.

Indeed he points out that Muslim law as developed by the jurists of later times "is better suited to a mercantile community like that of the city-dwelling Arabs than to the agricultural communities of the Punjab or Malabar or Malaya."[23]

2. The Shariat Act

But the Shariat Act, 1937[24] cut the root of all diverse

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22. HAMID ALI, CUSTOM AND LAW IN ANGLO-MUSLIM JURISPRUDENCE 39 (1938).

23. Id. 10.

24. The Muslim Personal Law (Shariat) Act, 1937 (hereinafter cited as the Shariat Act).

customary laws that governed the Muslims.[25] Section 2 of the Act declared:

> Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, . . . dower, guardianship, gifts, trust and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

Section 3 (1) of the Act enables a Muslim to be governed by Shariat with respect to adoption, wills and legacies, in addition to those topics mentioned in section 2 of the Act, by filing a declaration before a competent authority.[26]

Though there were dominant political motives in the passing of the Shariat Act of 1937 and even though, as Schacht points out, the Act "represented a concession to the purist tendencies of the traditionalists,"[27] still the claim of the supporters of the legislation that it was designed to give better rights to female heirs than were available under the customary laws was generally well-founded. However, as the Act is not applicable to agricultural

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25. The Shariat Act, 1937, sec. 2.

26. The Shariat Act, 1937, sec. 3 (1).

27. Schacht, Problems of Modern Islamic Legislation, 12 STUDIA ISLAMICA 99, 118 n.1 (1960).

lands, the beneficial aspects of the legislation stand curtailed drastically.[28] As contrasted with Pakistan, the legislatures in India, generally speaking, have not moved to extend the Act to agricultural lands. Thus in the State of East Punjab (now Haryana and Punjab), the Punjab Laws Act of 1872 continues to govern the devolution of agricultural lands. In Oudh, Ajmer-Merwara and Madhya Pradesh the position is similar to that in the East Punjab. On the other hand, Madras State extended the Shariat Act to agricultural lands, and a widow of a member of tarwad is entitled to inherit the share of her husband in the tarwad property according to Muslim law.[29]

The net result of the Shariat Act is that even after the lapse of quarter-century, it did not achieve the unification of the law applicable to Muslims and the total subordination to the Shariat as envisaged by the Muslim community. The aspirations of the reformers have not been fulfilled in view of the limited applicability of the Act. The only clear result appears to be that in certain states Muslim women suffer the anachronisms of Muslim law in relation to non-agricultural properties and of customary laws in relation to agricultural properties.

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28. The West Pakistan Muslim Personal Law (Shariat) Application Act, 1962.

29. Ayisumma v. Mayomooty, [1952] 2 M.L.J. 933.

In view of the drastic limitations on agricultural holdings now prevailing in India under the land legislations, the extension of the Act to agricultural lands now, without suitable alterations in the Muslim law of inheritance as indicated in the sixth chapter will give rise to serious problems of fragmentation of landholdings as to impair good husbandry.[30] The effect of the Shariat Act on the testamentary

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30. The following example given by Wigmore serves to illustrate the complex nature of division of property under the Muslim law: Deceased leaves a wife and, by her two sons and two daughters; then the wife dies, leaving a mother; then one daughter dies leaving a husband; and the shares are now to be partitioned. We have in conclusion:

Wife's mother	60/2880
Daughter's husband	235/2880
Each son	1035/2880
Daughter	517/2880

2 WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 567-68 (1928).

The suggestion that when father and mother of the deceased succeed to the estate of the deceased along with children, their interest should be only be for life will also check fragmentation. In addition, under the Muslim law the claim of an heir should only be a money-claim and not for specific portions of the estate. See p. 66 and pp. 258 Supra.

power of Khojas and Cutch Memons is far from being felicitious. Their freedom of testation with respect to agricultural properties is not affected. As regards non-agricultural properties Cutch Memons would be bound by the restrictions of Muslim law as to testamentary dispositions, and a Kojah if he makes a declaration as required by the Act. Thus, the present statutory position lacks clarity in policy. Therefore, the Shariat Act of 1937 should be repealed and all properties whether agricultural or non-agricultural should devolve according to the principles stated in the previous chapter.

CHAPTER EIGHT

TRENDS IN REFORM OF MUSLIM LAW AND SUGGESTIONS

At the beginning Muslim law represented a model legal system best suited to the then prevailing times in Arabia. However, with the passage of time and rapid changes in social structures, its conceptual frame-work did not reveal sufficient elasticity to adjust and accommodate to altered social conditions.[1] As has been observed by Kubali:

> Muslim law, like the Muslim religion from which it springs, was bound despite its marked tendency to regulate human activities down to the smallest detail — or precisely because of the very same tendency — to lose steadily, from the tenth century onwards, if not its validity at least its efficacy as a model legal system, for it then began to divest itself of its liberal and realistic spirit and finally became completely rigid.

This phase of rigidity continued till the nineteenth century. Abdur Rahim attributes the slow progress of Muslim laws as compared to the European laws to unfavourable political conditions and the social and intellectual stagnation.[2]

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1. Kubali, Modernization and Secularization as Determining Factors in Turkey, 9 INTERNATIONAL SOCIAL SCIENCE BULLETIN 65, 66 (1957).

2. ABDUR RAHIM, MUHAMMADAN JURISPRUDENCE 192 (1911).

The process of interaction of Western and Islamic cultures generated a movement for reform in the Muslim world. In Islamic societies two distinct approaches to legal reform are noticeable: first, the Restricted approach, viz., while recognizing the need for reform, a conscious effort is made to preserve the basis of the Sharia and not to alter it except to the extent necessary; second, the Revolutionary approach, viz., to prefer the enactment of new codes on the model of continental codes, and thereby give a secular basis to the legal institutions.

1. Restricted Reforms

The Restricted approach is most widely adopted in countries like Algeria, Egypt, Iraq, Pakistan and Morocco. Understandably, the reformers in these countries put forward claims for competence to effect the changes on Islamic principles. For instance, the Pakistani Commission sought the justification for reforms in its view of ijtihad. Coulson observes that "the whole approach of the Pakistani Commission constitutes an outright and fundamental denial of the doctrine of the infallible consensus."[3] Such rationalizations of reformers basically reflect the compulsive forces of policy-needs

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3. Coulson, Reform of Family Law in Pakistan, 7 STUDIA ISLAMICA 135, 137 (1957).

to suit the altered social conditions. But the modernists in attempting to advance theological justifications for their reforms are justly open to the attack that they are usurping a function which does not legitimately belong to them. The contradictions inherent in the approach of modernists who seek to effect reforms as being within the scope of the Sharia have been forcibly brought out in the following observation of Schacht:[4]

> On the one hand, the modernists are inclined to deny the religious, Islamic character of the relevant sections of Islamic law; in denying this, they come near to accepting by implication, though hardly ever explicitly, the concept of a secular law, even concerning those subject-matters which have been treated in the Koran. On the other hand they do not disdain to use somewhat arbitrary and forced interpretations of the Koran and of the other traditional sources of Islamic law, whenever it suits their purpose.

To put the matter in a nutshell:[5]

> As long as the present attitude of the majority of Muslim thinkers, and a great majority of individual Muslims, towards ancient Arabian law, as endorsed by the Koran persists, the improvements which have been suggested and in part been carried out, can be nothing but palliatives.

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4. Schacht, Problems of Modern Islamic Legislation, 12 STUDIA ISLAMICA 99, 119 (1960).

5. Id. at 106.

It should be pointed out that in none of the Muslim countries equality of sexes in the law of inheritance was accomplished by means of restricted reform keeping the general framework of Islamic law of inheritance intact.

2. Revolutionary Approach

The second approach is characterized by that of Turkey where Kamal Aturk replaced the law based on the Sharia with a new code drawn on the basis of the Swiss Code. Though apparently a drastic measure it is a logical approach. At the outset the question occurs what are the contributory factors that gave rise to the total reception of a foreign legal system ? Kubali states:[6]

> In Turkey, the process of reception, which dates from the middle of the nineteenth century, is determined by two cultural factors closely linked to each other by a causal relation, namely, the modernization — or more precisely the Westernization — and the secularization of Turkish customs and institutions.

The above mentioned cultural factors to an equal degree are to be found in India today. Beginning from the mid-nineteenth century, common law has been received in every sphere except in those pertaining to family and tenures. In addition, the Indian

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7. Kubali, Modernization and Secularization as Determining Factors in Reception in Turkey, 9 INTERNATIONAL SOCIAL BULLETIN 65 (1957).

society is multi-religious in character and is governed by a secular constitution. Further, Article 44 of the Constitution of India lays down: "The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."[7] Even if there be any doubt as to the degree of modernization that existed in Turkey in 1925 and that of contemporary India, it is beyond doubt that India will achieve the same degree of modernization in the near future.

Professor Timur's account of the reasons that led Turkey to favour the reception of a foreign code in the place of Sharia serve to illuminate the socio-legal context of the reception.[8] He says:

> In the first place, the Koran must be considered as a great book for all time. But we must frankly ask ourselves why it became necessary in legal matters to create and develop three other sources of Moslem law. Although certain rules and provisions set by sources other than the Koran are obviously general principles of justice and equity, with a high degree of objectivity, a considerable majority of them are essentially and primarily regulations necessitated by the social nature and structure of the Arab community of that time. This structure of the Arab community was largely responsible for Mohammed's acquisition of a

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7. THE CONSTITUTION OF INDIA, art. 44.

8. Timur, The Place of Islamic Law in Turkish Law Reform, 6 ANNALES DE FACULTE DE DROIT ISTANBUL UNIVERSITE 75, 77 (1956).

> position which was not restricted to spiritual domain only, but called for his indispensable guidance and teachings relting [sic] to the sphere of everyday relationships between individuals, and necessarily embracing legal concerns and principles. . . .
>
> It is essential to admit the fact that aside from the Koran proper and a few of the traditions, the remaining two sources of Moslem jurisprudence were essentially created to meet the needs of the community existing during and after Mohammed's era. But it is a postulate of social sciences that no society remains unchanged through time, and it is bound to go through a series of metamorphoses which naturally involve and bring about modifications in value judgments.

In addition to the above two approaches in reform, two other deserve mention in the Indian context: first, the Optional approach, as is exemplifed by the Special Marriage Act, 1954;[9] second, the Judicial and Constitutional approach.

The experience of the Special Marriage Act over the last fifteen years shows that the impact of Optional approach is restricted to a miscroscopic minority among educated people. Therefore, this experience suggests that any reliance on Optional approach as a means of achieving equality of sexes is misconceived.

3. The Judicial and Constitutional Approach

The above approach was adopted under the Constitution of Federal German Republic. Under the Basic Laws adopted in 1949, the

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9. The Special Marriage Act, 1954, secs. 22 to 28.

equality of sexes was recognised, and it was provided that all provisions inconsistent with this principle would be abrogated by April,1, 1953. But this expectation failed and legislation was not enacted to give effect to the principle of equality of sexes. However, the constitutional court pronounced that the constitutional principle should be given effect and declared all laws incompatible with equality of sexes invalid and the courts completely worked out new legal principles in a case-by-case fashion.[10]

4. Evaluation in the Indian Context

In assessing the above trends in reform of law, it is important to draw a distinction between unicultural and poly-cultural societies, that is, countries where there is a preponderance of adherents to the Muslim faith, and these where Islam constitutes one of the religions followed by the peoples but the Muslims do not constitute a majority. Generally speaking, in the former the public policy seeks to accommodate, as far as possible, with the Sharia, whereas in the latter the public policy establishes itself upon egalitarian principles and secular

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10. Rheinstein, The Law of Family and Succession, in CIVIL LAW IN THE MODERN WORLD 34-36, (Yiannopoulos ed. 1965).

foundations. The Civil Code of the Republic of China serves to illustrate the trends in poly-cultural societies. Bonderman points out the significant trend in the countries of the Near East that, though they are moving toward adopting the form of Western legal systems, they are drawing the substance from the underlying principles of Sharia.[11]

As early as 1914 two Muslim scholars in India expressed their views on the question of reform of Muslim law to suit the modern conditions. Khuda Baksh emphasised the role of the Prophet as a reformer in the Arab society and stated that the Quran should not be regarded as an obstruction to progress. He observed:[12]

> Nothing was more distant from the Prophet's thought, than to fetter the mind, or to lay down fixed, immutable unchanging laws for his followers. The Quran is a book of guidance to the faithful, and not, to be sure, an obstacle in the path of their social, moral, legal and intellectual progress.

Again,[13]

> It was never the intention of the Prophet -- and no enlightned Muslim believes that it ever was -- to lay down immutable rules, or to set up a system of law which was to binding upon humanity apart from considerations of time and place and the growing necessities arising from changed conditions.

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11. Bonderman, Modernization and Changing Perceptions of Islamic Law, 81 HARV.L.REV. 1169, 1193 (1968).

12. Khuda Baksh, The Spirit of Islam, in ESSAYS: INDIAN AND ISLAMIC 20 (1912).

13. Khuda Baksh, Thoughts on the Present Situation, in id. at 284.

Abdur-rahman, on the other hand, while recognising the need for reforms, interpreted the Quranic verses and traditions as to agree with his ideas of modern legislation on family law and succession.[14] Though it is the latter approach that prevails now in most countries of the Middle East, it is hard to deny the force of the following statement of Schacht: "This implies, of course, that the Muslim scholars for more than a thousand years, should have misunderstood the correct meaning of those 'sources' of Islamic law, and Abdur-rahman's whole method is unacceptable to an historian."[15]

More recently Fyzee called for a reinterpretation of Islam on the basis of following principles:[16] (1) Study of History of Religions, (2) Comparative Religion of the Semetic Races, (3) Study of Semetic languages and philology, (4) Separation of law from religion, (5) Re-examination of Shariah and Kalam and (6) Reinterpretation of cosmology and Scientific facts. Whether such a reinterpretation of the Quran will necessarily result in the

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14. ABDUR-RAHMAN, EINE KRITISCHE PRUFUNG DER QUELLEN DES ISLAMITISCHEN RECHTS (1914), cited in Schacht, supra note 4, at 106.

15. Schacht, supra note 4, at 105.

16. Fyzee, The Reinterpretation of Islam, THE ISLAMIC REVIEW Jan. 1960. p. 13-14.

acceptance of the principle of equality of sexes is a matter for conjecture. However, for our purposes the fourth principle enunciated by Professor Fyzee, namely, separation of law from religion, is of importance.[17] He says:

> Today in Islam this is the greatest difficulty, Shariah embraces both law and religion. Religion is based upon spiritual experience; law is based upon the will of the community as expressed by its legislature, or any other law making authority. Religion is unchangeable in its innermost kernal. . . . But laws differ from country to country, from time to time. They must ever seek to conform to the changing pattern of society.

Thus the opinions of scholars, practical considerations, the experience of progressive countries, and the compulsions of the ideals laid down in the Constitution of India lead to the conclusion that reforms in Muslim law in general, and equality of women in rights to inheritance in particular can only be achieved by the displacement of legal institutions based on the Sharia by new institutions having their foundation on secular principles taking into account the existing social conditions in India.

But the attainment of this ideal presents formidable problems in view of the general illiteracy of the people, the age-old traditions and the political considerations in a democratic system. The revolutionary approach of Turkey needs a strong enforcing machinery and in the present social and political

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17. Id. at 11.

conditions prevailing in India it is impracticable to accomplish. As noticed before, the Optional method touches only a fringe of the problem as it envisages individuals voluntarily opting for an alternative. As rules of intestate succession reflect the policy of a State the Optional approach, though desirable as a transitory measure, is of limited utility. Therefore other available modalities to achieve reforms, namely by legislation or by a judicial and constitutional technique or a combination of both deserve attention.

The Preamble to the Constitution of India proclaims the goal of achieving social, economic and political justice of the people. Further, article fourteen of the Constitution declares as a Fundamental Right of the people that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.[18] The importance of a Fundamental Right lies in the fact that article thirteen lays down: "All laws in force . . . in so far as they are inconsistent with the provisions of this Part /dealing with Fundamental Rights/, shall, to the extent of such inconsistency, be void".[19] Notwithstanding

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18. THE CONSTITUTION OF INDIA, art. 14.

19. THE CONSTITUTION OF INDIA, art. 13.

the above provisions, the discriminatory personal laws relating to inheritance rooted in the concepts and prejudices of bygone ages continue to be in force for over two decades. Two important reasons may be ascribed for the ineffectiveness of constitutional safeguards and the existing hiatus between the precept and practice. The first is the dicta in some early cases to the effect that the words "laws in force" in article thirteen do not include personal laws.[20] The second is the prevailing impression that discriminatory personal laws are valid on the basis of reasonable classification.[21] But it must be noted that in none of these cases the rights of inheritance were directly involved.

Therefore any proposed solution should take note of the existing judicial uncertainty and the dynamics of the legislative process. A bill providing for equal rights of inheritance would secure much lip sympathy but is unlikely to be acted upon for the fear that it may result in losing the votes of the conservative

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20. See State of Bombay v. Sidrappa, A.I.R. 1952 Bom. 84.

21. In Dwaraka Bai v. Nainan, A.I.R. 1953 Mad. 792, the contention was raised that section 10 of the Indian Divorce Act, 1869, was invalid in sofar, as it permitted the husband to get divorce on the ground of wife's adultery, but that a wife was required to establish an aggravating circumstance like cruelty or desertion in addition to husband's adultery. Panchapakesa Aiyar, J., observed: "I may add, however, that I consider that S. 10 as it stands, is not prima facie repugnant to Articles 13 to 15 of the Indian Constitution. It appears to be based on a sensible classification and after taking into consideration the abilities of man and woman, the results of their acts, and not merely based on sex, when alone it will be repugnant to the Constitution."

sections of the people. Also it is desirable that a period of time should be given to the legislature to bring about a smooth change-over but at the same time making it difficult that the goal of equality is defeated by legislative inaction. In this respect the West German technique is much suited to the Indian context.

It is submitted that as a preliminary step legislation should be introduced to the effect that notwithstanding any custom, text, rule or interpretation of law, any rule in the law of intestate succession which confers unequal shares to the heirs of the same degree on the ground of sex shall be void after a specified date. As the actual effects of the legislation will be felt after the period specified, a party in power will not hesitate to pass such an enactment for the fear of losing votes. If steps are initiated to change the law it will achieve a smooth transition. If on the other hand the legislature does not act, the discriminatory laws will cease to be operative after the prescribed date and the courts will by a case-by-case approach strike down or modify the rules to remove the existing discrimination. That very prospect itself will induce the legislature to introduce changes in laws to achieve equality of sexes. It is submitted that such an approach will help to achieve equality of sexes in the laws of inheritance and promote

the ideal laid down in article 38 of the Constitution that "The State shall strive to promote . . . a social order in which justice, social, economic and political, shall inform all the institutions of the national life".

GLOSSARY

Aliyasantana :- Succession or descent by the female line in Malabar.

Ancestral Property :- (Mitakshara law) All property inherited by a male Hindu from his father, father's father, or father's father's father. According to the Mitakshara law the sons, grandsons and great grandsons (in an unbroken line of male descent) acquire an interest in it by birth. Frequently the terms coparcenary property and joint family property are used synonymously with ancestral property.

Asami :- Cultivator, a tenant.

Bhumidar :- a landholder, or a proprietor.

Coparcenary :- A Hindu coparcenary is a narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property.

Dayabhaga :- A celebrated treatise on successions composed by Jimutavahana. This work is regarded as an authority in Bengal and the law followed there is known as the Dayabhaga school.

Dayabhaga Coparcenary :- In a Dayabhaga Coparcenary the father is regarded as the absolute owner of the property and no right by birth exists in favour of the sons.

Distant Kindred :- (Muslim law) Those relations by blood who are neither Sharers nor Residuaries.

Dower :- (Muslim law) A sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage.

Jimutavahana :- Author of Dayabhaga. His date is fixed between the 13th and the 15th centuries.

Illom :- An ordinary house in Malabar. Illom of Nambudiris (high caste people in Malabar) corresponds to tarwad.

Joint Hindu Family :- A Joint Hindu Family consists of all persons lineally descended from a common ancestor, and include their wives and unmarried daughters.

Khudkasht :- Land other than sir cultivated by a landlord, an under-proprietor, or a permanent tenure-holder as such, either himself or by servants or by hired labour. The U.P. Tenancy Act, 1939, sec. 3 (a).

Kutumba :- Family.

Manu :- The composer of the Code of Manu, or Laws of Manu or Manu Smriti. Manu Smriti has always been treated by Hindu sages and commentators, from the earliest times, as being of paramount authority.

Manu Smriti :- See Manu

Mehr :- See dower.

Mitakshara :- The famous commentary of Vijnanesevara on Yajnavalkya-Smriti.

Residuaries :- Those who take no prescribed share, but succeed to the "residue" of the inheritance after the claims of the "sharers" are satisfied in Muslim law.

Return :- (Muslim law) If there is a residue left after satisfying the claims of sharers, but there is no residuary, the residue reverts to the sharers in proportion to their shares.

Sharers :- Those who are entitled to a prescribed share of the inheritance under the Muslim law.

Sharia :- (Sharah) Islamic law based on the accepted sources like Quran, Traditions etc.

Shrardh :- An obsequial ceremony in which food and water are offered to the deceased ancestors of the sacrificer or to the pitris or manes collectively.

Sir :- A name applied to the lands in a village which are cultivated by the hereditary proprietors or village Zamindars themselves as their own special share, either by their own labourer and at their own cost, or by tenants at will, not being let in lease or Farm.

Sirdar :- See Sir-holder.

Sir-holder :- A landlord, an under-proprietor or a permanent tenure holder who possesses Sir.

Smruti :- The body of the recorded or remembered law, the ceremonial and legal institutes of the Hindus.

Sruti :- See Vedas.

Tarwad :- A Marumakkathayam family consisting of all the descendants in the female line of one common female ancestor.

Tavazhi :- A "Tavazhi" means a woman and her descendants in the female line. There may be many tavazhis in a tarwad. (38 Mad. 48. (1912)).

Tenure :- The manner whereby lands or tenements are held.

Vedas :- The general name of the chief sciptural authorities of the Hindus; it is properly applied to the four canonical works entitled severally the Rigveda, Yajur-veda, Sama-veda, and Atharva-veda.

Vijnaneswara :- The author of Mitakshara. He was an ascetic and lived in the later half of the eleventh century A.D.

Yajnavalkya :- A great Hindu sage and a writer of an important Smriti that bears his name.

Zamindar :- [An occupant of land]. A landholder. The rights of the Zamindar are the subject of much controversy. Originally they were rent-collectors but in due course usurped absolute rights in the lands under their control. Under the Permanent Settlement, the East India Company Administration recognized them as "actual proprietors" enjoying their estates in absolute ownership as long as they paid the government revenue.

Zamindari :- The office and rights of a Zamindar.

BIBLIOGRAPHY

ABDUL HUSSAIN, A HISTORY OF THE DEVELOPMENT OF MUSLIM LAW IN BRITISH INDIA. Calcutta, 1934.

ABDUR RAHIM, PRINCIPLES OF MAHOMEDAN JURISPRUDENCE. Madras, 1911.

ADAMS,C., A READER'S GUIDE TO GREAT RELIGIONS. Toranto, 1965.

ALBERY, M., THE INHERITANCE (FAMILY PROVISION) ACT, 1938. London, 1950.

ALLOT, A.N., ESSAYS IN AFRICAN LAW. London,1960.

ALLOT, A.N., JUDICIAL AND LEGAL SYSTEMS IN AFRICA. London,1962.

AMEER ALI, MAHOMMEDAN LAW, I (4th edition). Calcutta, 1912.

AMEER ALI, MAHOMMEDAN LAW, II (5th edition). Calcutta, 1929.

AMEER ALI, THE SPIRIT OF ISLAM. London, 1922.

ANDERSON, J.N.D., ISLAMIC LAW IN AFRICA. London,1954.

ANDERSON, J.N.D., ISLAMIC LAW IN THE MODERN WORLD. London,1959.

ATLARS OF ISLAMIC HISTORY. Princeton, 1952.

BAILLIE, N.B.E., A DIGEST OF MOOHUMMUDAN LAW, Parts I and II. London, 1869-75.

BENTHAM, J., THEORY OF LEGISLATION, (4th edition). London, 1882.

BHATTACHARYA, K.K., LAW RELATING TO HINDU JOINT FAMILY. Calcutta,1885.

BHASHYAM AIYANGAR, K.T., WOMEN IN HINDU LAW. Madras, 1928.

BOISSONADE, HISTOIRE DE LA RESERVE HEREDITAIRE. Paris, 1872.

BOULNOIS, C., & RATTIGAN, W.H., NOTES ON CUSTOMARY LAW AS ADMINISTERED IN THE COURTS OF THE PUNJAB, (2nd edition). Lahore, 1878.

BUCKLAND, W.W., A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN, (2nd edition). Cambridge, 1950.

CAHN, (ed.) SOCIAL MEANING OF LEGAL CONCEPTS. New York, 1948.

THE CIVIL CODE OF THE REPUBLIC OF CHINA, (Official Translation). Taiwan, 1961.

COMTOIS, R., TRAITÉ THÉORIQUE ET PRATIQUE DE LA COMMUNAUTÉ DE BIENS. Montreal, 1964.

CONSTITUENT ASSEMBLY DEBATES, (LEGISLATIVE) 1949. New Delhi, 1950.

DAINOW, J., CIVIL CODE OF LOUISIANA, REVISION OF 1870 WITH AMENDMENTS TO 1960. St. Paul, 1961.

DERRETT, J.D.M., AN INTRODUCTION TO MODERN HINDU LAW. Bombay, 1963.

DE FUNIAK, W.Q., PRINCIPLES OF COMMUNITY PROPERTY. New York, 1943.

DIAL, R., AN EXHAUSTIVE AND CRITICAL TREATISE ON INSURANCE LAW. New Delhi, 1956.

DONALDSON, D.M., THE SHI'ITE RELIGION. London, 1933.

THE ENCYCLOPAEDIA OF ISLAM (First edition, four volumes and Supplement, Leiden, 1913-42; Second edition, volume I, Leiden and London, 1960, continuing).

FARIBAULT, L., TRAITÉ DE DROIT DU QUÉBEC, X. Montreal, 1952.

FOUILLE, A., CHARMONT, J., DUGUIT, L., and DEMOGUE, R., MODERN FRENCH LEGAL PHILOSOPHY, (Translated by F.W. Scott and J.P. Chamberlain). New York, 1911.

FRIEDMANN, W., (ed). MATRIMONIAL PROPERTY LAW. London, 1955.

FYZEE A.A.A., A SHI'ITE CREED. London, 1942.

FYZEE, A.A.A., OUTLINES OF MAHOMEDAN LAW, (3rd edition). London, 1964.

GHARPURE, J.R., RIGHTS OF WOMEN UNDER THE HINDU LAW. Bombay, 1943.

GIBB, H.A.R., MOHAMMEDANISM, (2nd edition). London, 1953.

GIBB, H.A.R., MODERN TRENDS IN ISLAM. Chicago, 1954.

HAMILTON, C., THE HEDAYA, (2nd edition, ed. by S.C. Grady).

HOLDSWORTH, W.S., A HISTORY OF ENGLISH LAW, III (3rd edition). London, 1923.

HOLDSWORTH, W.S., A HISTORY OF ENGLISH LAW, IV & V. London, 1924.

HUEBNER, R., A HISTORY OF GERMANIC PRIVATE LAW (Translated by Francis S. Philbrick). London, 1918.

HUSSAIN, W., ADMINISTRATION OF JUSTICE DURING THE MUSLIM RULE IN INDIA. Calcutta, 1934.

JOLLY, J., OUTLINES OF AN HISTORY OF THE HINDU LAW OF PARTITION INHERITANCE AND ADOPTION. Calcutta, 1885.

KANE, P.V., HISTORY OF DHARMASHASTRA, III. Poona, 1946.

KANE, P.V., HISTORY OF DHARMASHASTRA, V, Parts I and II. Poona, 1958-62.

KHADDURI, M., & LIEBESNY, H. (eds.), LAW IN THE MIDDLE EAST. Washington, 1955.

KHUDA BAKSH, S., POLITICS IN ISLAM. Calcutta, 1920.

KHUDA BAKSH, S., STUDIES : INDIAN AND ISLAMIC. London, 1927.

KHUDA BAKSH, S., THE ARAB CIVILIZATION. Cambridge, 1926.

KHUDA BAKSH, S., ESSAYS : INDIAN AND ISLAMIC. London, 1912.

LEVY, R., SOCIAL STRUCTURE OF ISLAM. Cambridge, 1957.

MCDONALD, W.D., FRAUD ON THE WIDOW'S SHARE. Ann Arbor, 1960.

MACNACHTEN, W.H., PRINCIPLES AND PRECEDENTS OF MOOHUMMUDAN LAW. Calcutta, 1825.

MANUAL OF GERMAN LAW, I. British Foreign Office, London, 1950.

MARGOLIOUTH, D.S., THE EARLY DEVELOPMENT OF MOHAMMEDANISM. London, 1914.

MAYNE, J.D., A TREATISE ON HINDU LAW AND USAGE, (11th edition, edited by N. Chandrasekhara Aiyar). Madras, reprint 1953.

MAHUMUD, I., MUSLIM LAW OF SUCCESSION AND ADMINISTRATION. Karachi, 1958.

MCWHINNEY, E., (ed.), CANADIAN JURISPRUDENCE THE CIVIL AND COMMON LAW IN CANADA. Toranto, 1958.

MIGNAULT, P.-B., LE DROIT CIVIL CANADIEN, VI. Montreal, 1902.

MITTER, D., THE POSITION OF WOMEN IN HINDU LAW. Calcutta, 1913.

MIRAGLIA, L., COMPARATIVE LEGAL PHILOSOPHY, (Translated from the Italian by John Leslie). New York, 1921.

MORAL-LOPOZ, PRINCIPLES OF LAND CONSOLIDATION LEGISLATION. London, 1962.

MOREL, A., LES LIMITES DE LA LIBERTE TESTAMENTAIRE DANS LE DROIT DE LA PROVINCE DE QUEBEC. Paris, 1960.

MORLEY, W.H., ADMINISTRATION OF JUSTICE IN BRITISH INDIA. London,1858.

MUHAMMAD ALI, A MANUAL OF HADITH, (2nd edition). Lahore, n.d.

MULLA, D.F., PRINCIPLES OF MAHOMEDAN LAW, (16th edition, edited by Hidaytullah). Bombay, 1968.

MULLA, D.F., THE LAW OF INSOLVENCY IN INDIA, (2nd edition, edited by Bhagwati). Bombay, 1958.

MULLA, D.F., PRINCIPLES OF HINDU LAW, (13th edition, edited by Desai). Bombay, 1966.

OSTROROG, C., THE ANGORA REFORM. London, 1927.

PARAS, E., CIVIL CODE OF PHILIPPINES, (5th edition). Manila, 1967.

PLUCKNETT, T.F.T., A CONCISE HISTORY OF COMMON LAW, (5th edition). London, 1956.

REPORTS

THE REPORTS OF THE COMMISSION TO INVESTIGATE DEFECTS IN THE LAW OF ESTATES /NEW YORK/. New York, 1930.

REPORT OF THE HINDU LAW COMMITTEE, (Reprint). New Delhi, 1955.

REPORT OF THE MATRIMONIAL REGIMES COMMITTEE, CIVIL CODE REFORM COMMISSION. Montreal, 1966.

REPORT OF THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE, (Cmd. 9678). London, 1955.

REPORT OF THE COMMITTEE ON THE LAW OF INTESTATE SUCCESSION, (Cmd. 8310). London, 1965.

LAW OF SUCCESSION IN SCOTLAND, REPORT OF THE COMMITTEE OF INQUIRY, (Cmd. 8144). London, 1963.

THIRD REPORT OF THE TEMPORARY COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, TO THE GOVERNOR AND THE LEGISLATURE, (Legislative Document No. 19, 1964). New York, 1964.

FOURTH REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES TO THE GOVERNOR AND THE LEGISLATURE, (Legislative Document No. 19, 1965). New York, 1965.

THE NATIONAL SAMPLE SURVEY, Eleventh Round, August 1956 - January 1957, No. 51. Delhi, 1961.

TRAVAUX DE LA COMMISSION DE REFORME DU CODE CIVIL, 1948-49. Paris, 1949.

ROBERTS, R., THE SOCIALLLAWS OF QORAN. London, 1925.

ROSENTHAL, E.J.J., ISLAM IN THE MODERN NATIONAL STATE. Cambridge, 1965.

ROSS, A.D., THE HINDU FAMILY IN ITS URBAN SETTING. Oxford University Press, 1961.

SARVADHIKARI, R., HINDU LAW OF INHERITANCE, (2nd edition). Madras, 1922.

SCHACHT, J., THE ORIGINS OF MUHAMMADAN JURISPRUDENCE. Oxford, 1950.

SCHWARTZ, B., CODE NAPOLEON AND THE COMMON LAW WORLD. New York, 1956.

TABLE OF CASES

Debi Mangal Prasad v. Mahadeo Prasad, 39 I.A. 121 (1911).
Deendyal Lal v. Jugdeep Narain Singh, 4 I.A. 247 (1877).

Fischer v. Holland [1951] B.R. 118.

Girdharee Lall v. Kantoo Lall, 1 I.A. 321 (1874).
Gokalchand v. Hukum Chand Nathu Mal, 48 I.A. 162 (1921).
Govinda Chandra v. Abdul Majid, [1944] 1 Cal. 329.
Guran Ditta v. Ram Ditta, 55 I.A. 235 (1928).

Husseinbhai v. Advocate-General of Bombay, 20 Bom.L.R. 846 (1920).

Inda v. Inda, 288 N.Y. 315, 43 N.E. 2d 59 (1942) C.A.

Katama Natchiar v. The Rajah of Shivagunga, 9 M.I.A. 543 (1863).
Kerwick v. Kerwick, 47 I.A. 275 (1920).
Krause v. Krause, 285 N.Y. 27, 32 N.E. 2d 779 C.A. (1941).
Krishna Lal v. Nandeshwar, A.I.R. 1918 Pat. 91.

Le Strange v. Le Strange, 247 App. Div. 119, 286 N.Y. Supp. 814.

Lulloobhoy v. Cassibai, 7 I.A. 212 (1880).

Madho Parshad v. Mehrban Singh, 17 I.A. 194 (1890).

Mardana v. Masti and Ashraf, No. 1360 of 1870.

Metharam Ramrakhiमal v. Rewachand Ramrakhiomal, 45 I.A. 41 (1917).

Mitchell v. Mitchell, 290 N.Y. 779, 50 N.E. 2d (1943) C.A.

Muhammad Ibrahim v. Bibi Maiam 8 Pat. 484 (1929).

Mulraz Lachmia v. Chalekany Vençata Rama Jaggannadha Rao, 2 M.I.A. 54 (1838).

Munna Lal v. Raj Kumar, A.I.R. 1962 S.C. 1493.

Mussamut Nanomi Babuasin v. Modun Mohun, 13 I.A. 1 (1885).

Muthalammal v. Veera Raghavalu Naidu, A.I.R. 1953 Mad. 202.

Nagalutchmee Ummal v. Goppoo Nadaraja Chetty, 6 M.I.A. 309 (1856).

Nagaratnamba, D. v. Kunuku Ramayya, A.I.R. 1968 S.C. 254.

Nawazish Ali Khan v. Ali Raza Khan, 75 I.A. 62 (1948).

Newman v. Dore, 275 N.Y. 371, 9 N.E. 2d 966 (1937), 112 ALR 643 (1937).

Neelikisto Deb Burmono v. Beerchunder Thakoor, 12 M.I.A. 523 (1869).

Pathu Kutti Amma v. Nedungadi Bank Ltd. [1938] Mad. 148.

Pauliem Valloo v. Pauliem Sooryah, 4 I.A. 109 (1877).

Permanayakam v. Sivaram A.I.R. 1952 Mad. 419 (F.B.).

Pitchayya v. Rattamma, 55 M.L.J. 856 (1928).

Plante v. Travers, [1940] B.R. 555.

Ponnappa Pillai v. Pappuvayyangar, 4 Mad. 1 (1881).

Pratapmull Agarwalla v. Dhanabati Bibi 63 I.A. 33 (1935).

Ramalaxmi Ammal v. Siwanatha Perumal Sethurayer, 12 B.L.R. 396, (1872) (P.C.).

Ramlali v. Bhagunti Bai, A.I.R. 1968 M.P. 247.

Rangubai v. Laxman, A.I.R. 1966 Bom. 169.

Re Halpern, 303 N.Y. 33, 100 N.E. 2d 120 (1951).

Rukin Din v. Gujri, No. 576 of 1870.

Sadabart Prasad Sahu v. Foolbash Koer, 3 B.L.R. 31 (1869) (F.B.).

Sarojini Amma v. Neelakanta, A.I.R. 1961 Ke. 126 (F.B.).

Scott v. Sun Life Assurance Company of Canada, 38 R.de. J. 18 (1932).

Sheo Dyal Tewaree v. Judonath Tewaree, 9 W.R. 61 (1868).

Shiramabai v. Kalganda, A.I.R. 1964 Bom. 263.

Shrimati Hemangini Dasi v. Kedar Nath Kundu Chowdhry, 16 I.A. 115 (1889).

Sidrappa v. Laxmi Bai [1965] 1 MYSORE L.J. 625.

Subramania v. Commissioner of Income-Tax, A.I.R. 1955 Mad. 623.

Suraj Narain v. Iqbal Narain, 35 All. 80 (1912) (P.C.).

Varadiperumal Udaiyan v. Ardanari Udaiyan, 1 M.H.C.R. 412 (1863).

Venkata Reddi v. Lakshmana, A.I.R. 1963 S.C. 1601.

Waga v. Mihar Bibi, No. 78, P.R. 1868.

Zaffar Hussain v. Mahomed Ghiasuddin, 18 Lah. 276 (1937).

Zakeri Begum v. Sakina Begum, 19 I.A. 157 (1892).

TABLE OF STATUTES

BRITAIN

The Inheritance (Family Provision) Act, 1938 (1 & 2 Geo. 6, c. 45).

The Intestates' Estates Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 6).

CANADA

The Husbands and Parents Life Insurance Act, R.S.Q. 1964, c. 296.

The Quebec Succession Duty Act, R.S.Q. 1964, c. 70.

INDIA

The Caste Removal of Disabilities Act, (Act 20 of 1850).

The East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, (Act 50 of 1948).

The Cutch Memons Act, (Act 46 of 1920).

The Cutch Memons Amendment Act, (Act 34 of 1923).

The Cutch Memons Act, (Act 10 of 1938).

The Dowry Prohibition Act, (Act 28 of 1961).

The Estate Duty Act, (Act 34 of 1953).

The Hindu Adoptions and Maintenance Act, (Act 78 of 1956).

The Hindu Gains of Learning Act, (Act 30 of 1930).

The Hindu Law of Inheritance (Amendment) Act, (Act 2 of 1929).

The Hindu Inheritance (Removal of Disabilities) Act, (Act 12 of 1928).

The Hindu Marriage Act, (Act 25 of 1955).

The Hindu Succession Act, (Act 30 of 1956).

The Hindu Women's Rights to Property Act (Act 18 of 1937, amended by Act 11 of 1938).

The Indian Income-Tax Act, (Act 43 of 1961).

The Indian Succession Act, (Act 39 of 1925).

The Indian Trusts Act, (Act 2 of 1882).

The Muslim Personal Law (Shariat) Application Act, (Act 26 of 1937).

The Mussalman Wakf Validating Act, (Act 6 of 1913).

The Oudh Laws Act, (Act 18 of 1876).

The Presidency Towns Insolvency Act, (Act 3 of 1909).

The Provincial Insolvency Act, (Act 5 of 1920).

The Punjab Laws Act, (Act 4 of 1872).

The Provincial Insolvency (Amendment) Act, (Act 25 of 1948).

The Special Marriage Act, (Act 43 of 1954).

The Transfer of Property Act, (Act 4 of 1882).

The Uttar Pradesh Zamindari Abolition and Land Reforms Act, (Act 1 of 1951).

NEW YORK

Decedent Estate Law, N.Y. Sess. Laws 1929, c. 229.

Estates Powers and Trusts Law, L. 1966, c. 952.

PAKISTAN

The Muslim Family Laws Ordinance, 1961 ORDINANCE NO. VIII OF 1961.

The West Pakistan Muslim Personal Law (Shariat) Application Act, (Act V of 1962).